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No. 85-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

ROBERT LEWIS and DIANA LEWIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, notwithstanding 28 U.S.C. 1738, section 104 of the Indian Child Welfare Act, 25 U.S.C. 1914, permits an Indian tribe to litigate in federal court a claim, previously litigated unsuccessfully by the tribe in state court, that a state court adoption decree concerning an infant member of the tribe should be invalidated on the ground that, in violation of section 101(c) of the Indian Child Welfare Act, 25 U.S.C. 1911(c), the tribe was denied the right to intervene in the state court adoption proceeding.

2. Whether the strong national policy, expressed in the Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.*, to protect the relationship between Indian children and their families and tribes lifts any *res judicata* or collateral estoppel bar to federal court review of a claim or issue alleged to have been erroneously determined in a prior state court proceeding.

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The opinion of the court of appeals (App. 1-17) is reported at 777 F.2d 587. The opinion of the district court (App. 17-30) is unreported.

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JURISDICTION

The judgment of the court of appeals (App. 12-13) was entered on November 21, 1985, and the petition for rehearing was denied on March 6, 1986 (App. 14-15). The time within which to file the petition for writ of certiorari was extended to and including June 20, 1986 by order of Justice White entered on May 27, 1986 (App. 16).

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STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1738 provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

2. a. Title I (with the exclusion of sections 107, 108 and 113) and section 201(a) of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069-3076, 25 U.S.C. 1901 *et seq.*, are reproduced at App. 31-46.

b. Section 104 of the Indian Child Welfare Act, as codified at 25 U.S.C. 1914, provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102 and 103 of this Act.

c. Section 101(c) of the Indian Child Welfare Act, as codified at 25 U.S.C. 1911(c), provides:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

STATEMENT OF THE CASE

This case concerns the right of an Indian tribe to seek federal court invalidation of a state court adoption decree

entered in violation of the Indian Child Welfare Act (hereinafter "ICWA"), 25 U.S.C. 1901 *et seq.* Section 104 of ICWA, 25 U.S.C. 1914, provides that "the Indian child's tribe may petition any court of competent jurisdiction to invalidate" a state court action for, *inter alia,* the termination of parental rights to an Indian child "upon a showing that such action violated any provisions of [ICWA] sections 101, 102, and 103." The adoption decree at issue terminated the parental rights of a member of the petitioner tribe with respect to his son, also a member of the tribe. The tribe was denied the right to intervene in the adoption proceeding as required by section 101(c) of ICWA, 25 U.S.C. 1911(c). The denial was premised on the conclusion that the ICWA did not apply to the adoption proceeding. Thus, the basic issue in this case is whether a state court order terminating the parental rights of an Indian parent may be reviewed and invalidated by a federal court upon a finding that the state court erroneously determined not to apply the ICWA.

A. The State Court Proceedings and Related Facts.

The proceedings and facts before the trial and appellate courts of the State of Kansas are essentially set forth in *Matter of Adoption of Baby Boy L.,* 231 Kan. 199, 643 P.2d 168 (1982).*

On January 29, 1981, Seth Allan Lewis was born out-of-wedlock. His mother, Tina Marie Lazier, is non-Indian. His father, Carmon Perciado, is an enrolled member of the petitioner Kiowa Tribe. *Id.* at 172. On the day of Seth Allan's birth, Tina Lazier consented to his adoption by respondents Robert and Diana Lewis, non-Indians, and the

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*A copy of this decision is lodged with the Court.

Lewises petitioned the Sedgwick County District Court (Wichita, Kansas) for adoption. The court immediately entered an order granting the Lewises temporary custody of Seth Allan. *Id.* Carmon Perciado was notified of the adoption proceeding.

On March 9, 1981, the Lewises amended their adoption petition to allege that Perciado was unfit to have custody of Seth Allan and to request that his parental rights be terminated. *Id.* at 173. On March 11, 1981, having had no contact with the Kiowa Tribe, the State of Kansas Social and Rehabilitation Service filed a report with the court recommending the adoption. *Id.* on March 25, 1981, Perciado answered the amended adoption petition, asking that the adoption be denied and that he be granted permanent custody of Seth Allan. *Id.*

Trial on the adoption petition commenced on March 30-April 1, 1981. The court bifurcated the proceeding, hearing first the issue of terminating Perciado's parental rights and proceeding separately with the adoption. *Id.* On April 1, 1981, Perciado informed the court that he was an enrolled member of the Kiowa Tribe and requested that the adoption proceeding be conducted in accordance with the ICWA. The court continued the trial for thirty days in order to enable notice of the proceeding to be sent to the tribe. *Id.* On April 10, 1981, pursuant to 25 U.S.C. 1912(a), the Lewises notified the tribe of the proceeding. On April 14, 1981, Tina Lazier executed a second consent to the adoption of Seth Allan by the Lewises. *Id.* This consent was executed in conformity with 25 U.S.C. 1913(a). On May 7, 1981, Perciado filed an amended answer asking that Seth Allan be placed in accordance with ICWA placement preferences (see 25 U.S.C. 1915). *Id.*

On May 8, 1981, pursuant to 25 U.S.C. 1911(c), the Kiowa Tribe filed a petition to intervene in the adoption proceeding. *Id.* at 173, 176-177. On May 16, 1981, the governing body of the Kiowa Tribe adopted a resolution enrolling Seth Allan as a member of the Tribe. *Id.* at 173, 176.

On May 18, 1981, the court ordered the tribe and Perciado to file legal memoranda on the "applicability of the Indian Child Welfare Act to a proceeding for the adoption of an illegitimate child where the acknowledged putative father is a member of the Kiowa Indian Tribe, and [on] the . . . right of the Tribe to intervene if the act is applicable."* The tribe and Perciado filed the required memoranda and the Lewises filed a responsive memorandum.[1]

On June 15, 1981, pursuant to 25 U.S.C. 1911(b), the tribe and Perciado petitioned the court to transfer jurisdiction of the adoption proceeding to the Court of Indian Offenses established by the Secretary of the Interior in Anadarko, Oklahoma under 25 C.F.R. Part 11, *id.* at 173, the court which exercises jurisdiction over child custody matters for and on behalf of the Kiowa Tribe. At the same time, the tribe and Perciado also petitioned to have Seth Allan temporarily placed according to ICWA placement preferences (see 25 U.S.C. 1915(b)). *Id.*

On June 22, 1981, the court denied the Tribe's petition to intervene, ruling that the ICWA does not apply to circumstances involving the voluntary placement for adoption

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*A copy of this Order is lodged with the Court.

[1] Throughout the state court proceeding, the tribe and Perciado pursued separate interests and were aligned only on the ICWA applicability issue.

of an Indian child who has never been in the physical care and custody of an Indian family. According to the court, the ICWA applies only in situations where an Indian child is involuntarily removed from the physical custody of an Indian family. *Id.* at 174-75.

On June 23, 1981, the Kiowa Tribe, Perciado and his parents moved the district court below for an order restraining the Sedgwick County District Court from proceeding with the adoption of Seth Allan in the absence of compliance with the ICWA. Based on the fact that the state court had ruled the ICWA to be inapplicable, the motion was held moot and denied. *Kiowa Tribe of Oklahoma, et al. v. Eighteenth Judicial District Court, Sedgwick County, Kansas, et al.*, Civ. No. 81-1266 (D. Kan. June 23, 1981) (unreported).*

On June 24, 1981, the Sedgwick County District Court denied the petitions of the tribe and Perciado to transfer jurisdiction and change custody, concluding that the inapplicability of the ICWA rendered these petitions moot. *Matter of the Adoption of Baby Boy L., supra,* 643 P.2d at 173. The court then continued the trial on Perciado's fitness. At the conclusion of Perciado's evidence, the court ruled that Perciado was unfit and that, therefore, his consent to the Lewises' adoption was unnecessary. *Id.* The court terminated Perciado's parental rights and then heard evidence on the suitability of the Lewises to adopt Seth Allan. *Id.* The Kiowa Tribe requested that it be permitted to participate in this part of the proceeding. The request

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*A copy of the order denying this motion is lodged with the Court.

was denied. The respondents then testified for the first time. Upon completion of their testimony, the court granted the adoption. *Id.* at 173-74.

The Kiowa Tribe appealed, asserting that the trial court's failure to apply the ICWA rendered the adoption decree invalid. On April 3, 1982, the Kansas Supreme Court affirmed the adoption decree. *Matter of Adoption of Baby Boy L., supra.* Like the trial court, the Kansas Supreme Court reasoned that the ICWA was intended to apply only in circumstances involving the involuntary physical removal of an Indian child from an Indian home or environment. *Id.* at 175. Thus, according to the court, the ICWA, "by its own terms," does not apply to a proceeding involving an Indian child who has never been in the physical custody of an Indian family because on the day of its birth the child was placed by its non-Indian mother in the physical care of a non-Indian family. *Id.* at 175-76. The court did observe, however, that if the ICWA were applicable "it was error to refuse to allow the Kiowa Tribe to intervene." *Id.* at 176.

B. The Proceedings In This Case.[2]

On July 5, 1983, the Kiowa Tribe filed this action in the district court below, asserting federal jurisdiction under 28 U.S.C. 1331, 1332, 1337, 1343(3) and 1362. The action sought, *inter alia,* a declaration that the Kansas state court adoption proceeding violated section 101(c), 25

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[2] On September 10, 1982, the Kiowa Tribe filed *Kiowa Tribe of Oklahoma v. Lewis,* 82-CIV-1453 (U.S.D.C. W.D. Okla.), an action virtually identical to the case at bar. On April 22, 1983, the action was dismissed for lack of personal jurisdiction over the Lewises.

U.S.C. 1911(c), of the ICWA and that, therefore, the adoption decree was invalid.

On October 28, 1983, the district court dismissed the Kiowa Tribe's complaint, holding that since the Kansas courts had determined the ICWA to be inapplicable to the adoption proceeding, *res judicata* and collateral estoppel precluded the tribe from relitigating the ICWA applicability issue in federal court. The court ruled that a federal court, under section 104 of the ICWA, may determine whether the ICWA was applicable to a prior state court child custody proceeding only if the state court has not considered or determined the issue. (App. 19).

The court of appeals affirmed. Applying Kansas claim and issue preclusion rules, the court of appeals held that, under Kansas law, the Kiowa Tribe's action would be barred by *res judicata* and collateral estoppel. The court found that in the state proceeding and in this action the central issue was essentially identical, *viz.*, applicability of ICWA to Seth Allan's adoption. (App. 4-5).

The court of appeals acknowledged that the judgments of the Kansas courts would be divested of any preclusive effect if they were " 'fundamentally flawed'," *quoting Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480 (1982), or if "Congress intended state court judgments concerning the ICWA's applicability to be excepted from [28 U.S.C.] § 1738's command of full faith and credit." (App. 6). The court held that since the Kiowa Tribe was afforded procedural due process in litigating the ICWA applicability issue in the Kansas courts, the judgments of those courts were not "fundamentally flawed." (App. 7).

In reviewing whether Congress intended section 104 of the ICWA to except state court judgments from the full faith and credit requirements of section 1738, the court of appeals concluded that section 104 does not contain an express or implied partial repeal of section 1738 "authorizing federal courts to adjudicate custody of Indian children independently after a state court has rendered a final judgment, in litigation in which the interested Indian tribe has participated." (App. 9).

While recognizing that "[s]ection 1911(c) of [ICWA] expressly gives the child's Indian tribe the right to intervene in state court proceedings involving the child's custody," the court of appeals rejected petitioner's contention that the authorization, in section 104 of ICWA, for "the Indian child's tribe" to "petition any court of competent jurisdiction to invalidate" state child custody determinations made in violation of section 1911(c), was intended to bar applicability of the full faith and credit requirements of 28 U.S.C. 1738. The court of appeals concluded that section 104 does no more than state where actions "may initially be brought" to invalidate state court child custody orders that violate the ICWA. (App. 10).

ARGUMENT

I. THE CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW.

A. Section 104 of the ICWA authorizes federal courts to review and invalidate the final judgments of state courts in Indian child custody proceedings.

The court of appeals has held that a state trial and appellate court having determined the ICWA to be inapplicable to a child custody proceeding involving an Indian child, section 104 of ICWA does not expressly or impliedly authorize the Indian child's tribe to relitigate the question of the ICWA's applicability in federal court. Therefore, even if as here, state courts have adjudicated the custody of an Indian child in violation of sections 101, 102 and 103 of the Act, by the mere declaration that the Act is inapplicable to the proceeding, state courts achieve immunity from the provisions of the ICWA while depriving federal courts of authority to remedy ICWA violations. The court of appeals' holding misconceives congressional purpose and intent, jeopardizing Indian children, families and tribes by stripping the ICWA of a critical federal court remedy designed to protect and safeguard them from state court violations of the ICWA.

Analysis of the ICWA and its legislative history supports the conclusion that Congress impliedly, if not expressly, intended section 104 to authorize federal court review of the Indian child custody judgments rendered by state courts, both trial and appellate, 28 U.S.C. 1738 and the doctrines of *res judicata* and collateral estoppel notwithstanding. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81-82 (1984); *Kremer v.*

Chemical Construction Corporation, 456 U.S. 461, 469 (1982); *Allen v. McCurry*, 449 U.S. 90, 97-99, 101 (1980) (all noting that the language or operation of a federal statute can expressly or impliedly modify or repeal section 1738 and lift the bar to relitigation otherwise interposed by the doctrines of *res judicata* and collateral estoppel).

In determining the need for the ICWA, the Congress found

> that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and *judicial bodies*, have often failed to recognize the essential tribal relations of Indian people. . . .

25 U.S.C. 1901(5) (Emphasis added). The legislative history of the ICWA also includes severe criticism of state court proceedings involving the placement of Indian children in foster and adoptive homes. Congressman Morris Udall, Chairman of the House Committee on Interior and Insular Affairs and chief sponsor of the bill that became the ICWA, stressed that a principal purpose of the ICWA was to curb certain abusive practices of state courts in the foster care and adoptive placement of Indian children and in the termination of parental rights of Indian parents.

> I firmly believe that a review of the legislative record of this bill will persuade one that a domestic crisis exists for Indian families and that state courts and agencies and their procedures share a large part of the responsibility for this crisis. I firmly believe that the future and integrity of Indian tribes and families are in danger because of this crisis.

124 Cong.Rec. H12850 (October 14, 1978) (part of reprinted letter to Assistant Attorney General Patricia Wald).[3]

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[3] For similar concerns, see remarks of Cong. Udall in his address to the House urging enactment of the ICWA, *id.* at H12848;

(Continued on following page)

The Senate and House Reports on the ICWA further illuminate the "responsibility" of state courts for creating the Indian child welfare "crisis." The Senate Report noted "that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies,"[4] that the separations were "frequently" unwarranted, and "that serious emotional problems often occur as a result of placing Indian children in homes which do not reflect their special cultural needs." *Id.* at 11-12. To correct these and other problems, the Senate Report on the ICWA emphasizes that the purpose of the ICWA is to "insure that Indian parents will be accorded a fair hearing when child placement is at issue" in a state court proceeding. *Id.* at 9. In order to assure a fair hearing, the ICWA "establishes procedural safeguards for parents or extended family members in child placement proceedings by nontribal public or private agencies." *Id.* at 10-11.

Similarly, the House Report observed that state court judges generally are not "knowledgeable about Indian life" and apply an inappropriate "definition of the standards of child abuse and neglect." H.Rep.No. 95-1386, 95th Cong. 2d Sess. 10-11 (July 24, 1978). The Report concluded that "[t]he decision to take Indian children from their natural homes is, in most cases, carried out without due process of

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Cong. Robert Lagomarsino, chief minority co-sponsor of the ICWA, in his address to the House urging enactment, *id.* at H12849-H12850; and S.Rep.No. 95-597, 95th Cong. 1st Sess. 45 (November 3, 1977).

[4] The Senate Report generally does not use the word "court." Instead, it uses the phrase "nontribal public or private agency," a phrase defined, in the Senate version of the ICWA, to include courts. *Id.* at 2.

law." *Id.* at 11. A harsher condemnation of the practices of state judicial systems is unimaginable.

In order to eliminate the "domestic crisis . . . for Indian families" created by state courts and agencies,[5] assure due process of law in custody proceedings involving Indian children, and "prevent the separation of Indian children from family and tribal heritage, the . . . [ICWA] established minimum federal standards applicable to child custody proceedings." *Matter of Appeal in Pima County Juvenile Action,* 130 Ariz. 202, 635 P.2d 187, 188 (Ct.App. 1981), *cert. den.,* 455 U.S. 1007 (1982). *Accord, A.B.M. v. M.H.,* 651 P.2d 1170, 1172 (Alas. 1982), *cert. den.,* 461 U.S. 914 (1983); 25 U.S.C. 1903 ("to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families [, the ICWA establishes] . . . minimum Federal standards for . . . the placement of . . . [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture").

The ICWA clearly seeks to protect compelling federal and tribal interests that the Congress determined were largely ignored, if not defeated, in state child custody pro-

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[5] The ICWA describes the "crisis" in terms of the "alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies" and the "alarmingly high percentage of such children . . . placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. 1901(4). *See also, Matter of J.R.S.,* 690 P.2d 10, 11 (Alas. 1984); *In the Interest of J.R.H.,* 358 N.W.2d 311, 321 (Iowa 1984); *Matter of Appeal in Maricopa County, Juvenile Action No. A-25525,* 136 Ariz. 528, 667 P.2d 228, 233 (Ct. App. 1983); *Matter of Appeal in Pima County Juvenile Action, supra,* 635 P.2d at 188 (all acknowledging that state court practices abusive of Indian rights provoked enactment of ICWA).

ceedings involving Indian children. *See e.g.* 25 U.S.C. 1901(3) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and . . . the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe"). In light of the purpose of Congress to provide tribes with procedural safeguards against state court practices and decisions that failed to recognize legitimate tribal cultural integrity and survival interests in child custody proceedings involving Indian children, it is clearly consistent with and necessary to the fulfillment of the ICWA purposes that federal courts, as "courts of competent jurisdiction," exercise jurisdiction to review tribal claims that a state court foster care placement or termination of parental rights proceeding did not accord the tribe one of the "minimum" procedural protections guaranteed by the ICWA.

That the Congress intended the "any court of competent jurisdiction" language of section 104 to include federal courts is plainly indicated by examination of 25 U.S.C. 1921 and 1931 (a) (8). The former section makes express reference to "Federal court" and both sections refer to "Federal child custody proceedings."[6] Since federal law does not confer jurisdiction on federal courts with respect to foster care placement, termination of parental rights

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[6] The ICWA defines the term "child custody proceeding" to include "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement." 25 U.S.C. 1903(1). The substantive provisions of the ICWA make clear that the "child custody proceedings" covered by the ICWA are state court proceedings conducted pursuant to state law. *See*, 25 U.S.C. 1911(a), (b) and (c), 1912(a)-(d), 1913(b) and (d), 1915 (a) and (e), 1916 (a), 1919, 1920, and 1922.

and adoption, all traditional state law concerns, *Lenman v. Lycoming County Children's Services*, 458 U.S. 502, 511-12, 515 (1982), the references to federal child custody proceedings in sections 1921 and 1931(a)(8) only make sense if Congress, through section 104, intended to authorize federal courts, as "courts of competent jurisdiction," to invalidate state court actions in violation of the ICWA.

The legislative history of the section 101(c) right to intervene also supports the conclusion that section 104 authorizes federal courts to invalidate state court actions that violate the ICWA. The right of tribes to notice, 25 U.S.C. 1912(a), and to intervene "at any point" in "any State court proceedings for the foster care placement of, or termination of parental rights to, an Indian child," 25 U.S.C. 1911(c), is critical among the "minimum Federal standards" established by the ICWA. The court of appeals recognized this. (App. 9-10). The ICWA provides for a tribal right of intervention in recognition of the fundamental and compelling interest of tribes in maintaining a relationship with and in protecting the health and well-being of their children. *See In re the Custody of S.B.R.*, 43 Wash. App. 622, — P.2d —, sl. op. at 5 (May 12, 1986); *Matter of J.R.S., supra*, 690 P.2d at 15, 18; *Matter of Appeal in Maricopa County Juvenile Action No. A-25525, supra*, 667 P.2d at 233.

> For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities.
>
> The United States, as trustee for Indian tribal lands and resources, has a clear interest and responsibility to act to assist tribes in protecting their most precious

> resource, their children. H.R. 12533 is, therefore, designed to prevent the unnecessary and unjustifiable separation of Indian children from their families and tribal communities. . . .

124 Cong. Rec. H12849-H12850 (October 14, 1978) (remarks of Cong. Lagomarsino urging House enactment of the ICWA).[7]

Legislation incorporating a right of tribes to intervene "as a party in interest in child placement proceedings" was recommended to the Congress in the 1977 Final Report of the American Indian Policy Review Commission, a Commission of the Congress. S.Rep.No. 95-597, *supra*, at 40. The Commission observed that a tribe stands in the "relationship . . . of *parens patriae* to all its tribal members." *Id.* at 51. And, "considering that in reality, Indian children are usually culturally and tribally terminated by placements to non-Indian homes when they are subject to State court systems," *id.*, the Commission recommended maximum participation by tribes in custody decisions involving Indian children. The recommendation was based on findings which included the following:

> 2. Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and

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[7] The legislative history of the ICWA contains many similar expressions. *See e.g.*, H.Rep.No. 95-1386, *supra*, at 15; 124 Cong. Rec. H12849 (October 14, 1978) (House address of Cong. Udall urging enactment of the ICWA); Hearings on S. 1214: To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, And for Other Purposes, Select Committee on Indian Affairs, United States Senate, 95th Cong. 1st Sess. 2 (August 4, 1977) (statement of Senator James Abourezk, Chairman of the Select Committee on Indian Affairs and principal Senate sponsor of the ICWA).

> has damaging social and psychological impact on many individual Indian children.
>
> * * *
>
> 6. The U.S. Government . . . has failed to protect the most valuable resource of any tribe—its children.
>
> 7. The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.

Id. at 52. The Commission also found that "[e]ven when a tribe seeks to aggressively assert its interest in child custody proceedings in non-Indian forums, it cannot do so as a matter of right." *Id.* at 45. Section 1911(c) of the ICWA is derived in part from the Commission's recommendation and the underlying premises for it. *Id.* at 37-53; H. Rep. No. 95-1386, *supra,* at 27; Hearings on S. 1214: To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, And for Other Purposes, Subcommittee on Indian Affairs and Public Lands, United States House of Representatives, 95th Cong. 2d Sess. 32 (February 9 and March 9, 1978) ("The American Indian Policy Review Commission's final report stresses the right of a tribe to notice of and to have an opportunity to intervene in any nontribal placement proceeding involving one of its juvenile members").

The right of tribes to intervene in custody proceedings involving Indian children was intended by Congress to meet "the all-important demands of Indian tribes to have a say in how their children and families are dealt with." Senate Hearings on S. 1214, *supra,* at 2. The right is one of the "procedural burdens" imposed "upon State courts in order to protect the substantive rights of Indian children, Indian

parents, and Indian tribes in State court proceedings for child custody." H.Rep.No. 95-1386, *supra*, at 18. The House Report Conclusion poignantly states the vital need for the ICWA's "minimum Federal standards."

> Contributing to [the growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, in non-Indian foster or adoptive homes,] . . . has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.
>
> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

Id. at 19.

The right of tribes to participate in state court Indian child custody proceedings is so central to the objectives of the ICWA, expressed in 25 U.S.C. 1902, that, in order to insure that state courts do not frustrate the purposes of the ICWA, section 104, at least implicitly, authorizes federal courts to review the merits of any state court judgment holding the ICWA inapplicable and, therefore, denying the right of a tribe to intervene, and, if appropriate, to enforce the ICWA's minimum procedural guarantees. Any other conclusion would force tribes to choose between litigating the applicability of the ICWA in a state court child custody proceeding or, in order to avoid *res judicata* or collateral

estoppel and preserve the section 104 right to seek federal court invalidation of a state court foster care placement or termination of parental rights, remaining uninvolved in the state court proceeding. *See* App. 8. Obviously, such a choice conflicts with the ICWA intent that states continue to exercise "their traditional jurisdiction over Indian children" and the ICWA purpose to maximize opportunities for tribal participation in state court Indian child custody proceedings.

The court of appeals' holding strips section 104 of any effect. The section is triggered by "any action for foster care placement or termination of parental rights under State law." Thus dependent on a prior state court action, a petition to invalidate such a foster care placement or termination of parental rights can never "initially be brought," App. 10, in federal court under section 104. Nor, according to the court of appeals, can a section 104 petition be brought in federal court after entry of a final state court judgment. *Id.* Consequently, the court of appeals' holding limits section 104 to state court petitions. However, since every state permits appeal of foster care placement and termination of parental rights judgments and *res judicata* and collateral estoppel bar state court relitigation of such judgments, section 104, to be given effect, must be construed to authorize the collateral attack in federal court of a final judgment of a state trial court, if not appealed, or of a state appellate court. (In condemning the abusive practices of state courts, the ICWA and its legislative history do not except appellate courts). *Sitka Community Association Indian Tribe v. Perkins,* Civ. No. J85-018, sl.op. (U.S.D.C. D.Alas. September 30, 1985) (unreported) (federal courts may invalidate state court judgments pursuant

to section 104 "[o]nly after state court remedies are exhausted," sl.op. at 4); *Kickapoo Tribe v. Department of Human Services,* No. 81-947-T, sl.op. (U.S.D.C. W.D.Okla. August 10, 1984) (unreported), *appeal docketed,* No. 84-2279 (10th Cir. September 18, 1984) (upon petition of an Indian tribe denied the right to intervene because of a ruling that the ICWA was inapplicable, federal courts, the doctrines of *res judicata* and collateral estoppel notwithstanding, have jurisdiction under the ICWA to invalidate a state court final decree of adoption not in compliance with the ICWA, sl.op. at 3-4, 11-12).[8] Like all of Title I of the ICWA, section 104 is clearly intended to add to, and not simply restate, procedures and remedies otherwise available under state law.

B. The national policy expressed in section 1902 of the ICWA overrides any res judicata or collateral estoppel bar to this action.

Assuming *arguendo* that section 104 of the ICWA does not lift the bar to relitigation otherwise imposed by 28 U.S.C. 1738, the special legal relationship between the United States and Indian tribes, 25 U.S.C. 1901(1) and (2), and the strong federal interest in and duty to protect the substantial Indian rights guaranteed by the ICWA require

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[8] Contrary to the understanding of the court of appeals, a section 104 petition to invalidate a state court termination of parental rights does not involve federal courts in "adjudicat[ing] custody of Indian children." App. 9. A section 104 petition only seeks federal court determination of whether the ICWA was properly applied in the state court Indian child custody proceeding. A determination that the ICWA was not properly applied requires invalidation of the state court judgment and remand to the state court for an adjudication of custody in accordance with the ICWA. *Id.* at 17.

that the application of *res judicata* and collateral estoppel be stayed to permit relitigation of the ICWA applicability issue erroneously determined by the Kansas courts. *Red Fox v. Red Fox,* 564 F.2d 361, 364-65 (9th Cir. 1977); *Mashpee Tribe v. Watt,* 542 F.Supp. 797, 802 (D. Mass. 1982). *Cf.*: *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 333 (1971); *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 332 (1979) (both indicating that in determining whether the *res judicata* and collateral estoppel bar should be lifted on the ground that a party was not afforded a "full and fair opportunity" to litigate in a prior lawsuit, it is appropriate to consider whether the first determination properly applied applicable law).

Application of *res judicata* and collateral estoppel principles to bar relitigation is grounded on finality considerations and on federalism and comity concerns. By enactment of the ICWA, the Congress has determined that in matters involving the custody of Indian children these concerns are outweighed by the national policy imperative "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. 1902, by enforcement of strict compliance with ICWA requirements. The Congress having found that the Indian child custody practices of state courts and agencies abused the rights of Indian tribes and families and were not in the best interest of Indian children, the ICWA was passed as a deliberate and substantial federal intrusion upon state court child custody proceedings. Consequently, when a state court refuses to apply the ICWA to a proceeding plainly falling within its ambit, federal courts must be available to exercise jurisdiction and assure that the pol-

icies expressed in and the "minimum" procedures required by the ICWA are not frustrated. *Cf.*: *Lehman v. Lycoming County Children's Services, supra,* 458 U.S. at 515-16.

1. The Kansas court judgments are plainly erroneous.

Focusing on the word "removal" in 25 U.S.C. 1902, the Kansas courts concluded that the ICWA was inapplicable to the adoption proceeding involving Seth Allan Lewis because the child was never "removed" from the physical custody of an Indian family. See also the use of the word "removal" in 25 U.S.C. 1901(4). The word "removal" in these sections is part of the Congress' findings of fact justifying enactment of the ICWA and declaration of national policy. Congressional statements of policy and findings of fact ". . . do not constitute an execution of the *will* of Congress which is legislation, but [are] a recital of considerations which in the *opinion* of that body existed and justified the expression of its will. . . ." *Carter v. Carter Coal Co.,* 298 U.S. 238, 290 (1936) (Emphasis in original). When, as with the ICWA, 25 U.S.C. 1903-1923, the substantive provisions of a statute unambiguously express the will of Congress, it is the duty of courts to implement the plain import of the statute and not engage in construction destructive of the statutory scheme. *Id.; Coosaw Mining Co. v. South Carolina,* 144 U.S. 550, 563 (1892); *Yazoo & Mississippi Valley R. Co. v. Thomas,* 132 U.S. 174, 188 (1889); *Bissette v. Colonial Mortgage Corp. of D.C.,* 477 F.2d 1245, 1245-47 (D.C. Cir. 1973). The Kansas courts ignored these principles of statutory construction and construed the ICWA in a manner contrary to express Congressional will and destructive of the statutory scheme.

Even a cursory glance at the ICWA reveals that its provisions are triggered by the presence of only two ele-

ments: (1) a state court "child custody proceeding," as that term is defined in 25 U.S.C. 1903(1), and (2) an "Indian child," as that term is defined in 25 U.S.C. 1903(4), as the subject of such proceeding. *See e.g. In re the Custody of S.B.R., supra,* sl. op. at 3; *Matter of Kreft,* 148 Mich. App. 682, 384 N.W.2d 843, 845 (Ct. App. 1986); *State ex rel. Juvenile Department of Lane County v. Tucker,* 76 Or.App. 673, 710 P.2d 793, 795-96 (1985); *Matter of B.R.B.,* 381 N.W.2d 283, 284 (S.D. 1985); *In the Interest of J.R.H., supra,* 358 N.W.2d at 321; *Matter of Appeal In Maricopa County Juvenile Action No. A-25525, supra,* 667 P.2d at 231-32; *In re Junious M.,* 144 Cal.App.3d 786, 193 Cal.Rptr. 40, 40-42 (1st Dist. 1983); *A.B.M. v. M.H., supra,* 651 P.2d at 1173.[9] These two elements were indisputably present in the state court proceedings underlying this action. *Matter of the Adoption of Baby Boy L., supra,* 643 P.2d at 173, 176.

Under 25 U.S.C. 1911(c), the petitioner "Indian child's tribe" had a "right to intervene" in the Kansas "State

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[9] *In re the Custody of S.B.R., supra,* sl.op. at 4, and *Matter of Appeal in Maricopa County Juvenile Action No. A-25525, supra,* 667 P.2d at 233 n. 5, expressly reject *Matter of the Adoption of Baby Boy L., supra.* Without citing the Kansas decision, *Kickapoo Tribe v. Department of Human Services, supra,* rejects the rationale of *Matter of the Adoption of Baby Boy L.* by invalidating a state court termination of parental rights of an Indian father who never had had custody of the child—recognizing the father's right to seek custody, and by ruling that ICWA placement preferences, 25 U.S.C. 1915, govern regardless of whether the child has ever been in the custody of an Indian family. *Contra, see In the Matter of the Adoption of Baby Boy D.,* — Okla. —, — P.2d —, 56 Okla. Bar J. 2669, 12 Ind.L.Rptr. 5117 (November 12, 1985), petition for rehearing pending; and *In the Matter of the Adoption of Johnson,* — Okla. —, — P.2d —, 56 Okla. Bar J. 2660, 12 Ind.L.Rptr. 5128 (November 12, 1985), petition for rehearing pending (both adopting, without citation, the rationale of *Matter of the Adoption of Baby Boy L.).*

court proceeding for the . . . termination of parental rights to an Indian child," Seth Allan, regardless of whether the proceeding involved the "removal" of Seth Allan from the physical custody of an Indian family. As with the ICWA as a whole, the objective of the intervention provision is to "prevent the separation of Indian children from family and tribal heritage. . . . The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected. . . ." *Matter of Appeal in Pima County Juvenile Action, supra,* 635 P.2d at 188-89. *Accord,* H.Rep.No. 95-1386, *supra,* at 23. Accordingly, the ICWA governs all voluntary and involuntary foster and adoptive home placements of Indian children, 25 U.S.C. 1912, 1913, 1915, with the exception only of "a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. 1903(1). *See, In re the Custody of S.B.R., supra,* sl.op. at 4; *In re Junious M., supra,* 193 Cal.Rptr. at 46; *A.B.M. v. M.H., supra,* 651 P.2d at 1173. The emphasis of the ICWA on establishing minimum federal standards for the "placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture," 25 U.S.C. 1902, and the provisions governing the voluntary foster or adoptive home placement of Indian children, 25 U.S.C. 1913, stand in clear opposition to any construction limiting the ICWA, as the Kansas courts have, to the involuntary "removal" of Indian children from the physical custody of Indian families.[10] The limitation espoused by the

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[10] By rendering void any foster care placement or termination of parental rights consented to within ten days after the

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Kansas courts plainly defeats the Congress' finding that "no resource . . . is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. 1901(2), the Congress' recognition of "the essential tribal relations of Indian people," 25 U.S.C. 1901(5), and the Congress' determination to "protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. *See Matter of Appeal in Maricopa County Juvenile Action No. A-25525, supra,* 667 P.2d at 233; *In re Junious M., supra,* 193 Cal.Rptr. at 46. The construction of the ICWA adopted by the Kansas courts is "transparently erroneous" and, therefore, the Kansas judgments should not be given *res judicata* or collateral estoppel effect in the federal courts. *Red Fox v. Red Fox, supra,* 564 F.2d at 364-65.

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CONCLUSION

The petition raises questions of federal law of signal importance to all Indian tribes and to the United States, as trustee. In the interest of uniform national application of the ICWA and of guaranteeing that its provisions will protect Indian children, families and tribes in the manner contemplated by Congress, the petition should be granted and a

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birth of an Indian child, 25 U.S.C. 1913(a) clearly covers newborn Indian children who, like Seth Allan, have not had the opportunity to be in the physical custody of an Indian family. *See In re Junious M., supra,* 193 Cal.Rptr. at 46. The concern of the ICWA with the foster or adoptive home *placement* of Indian children is indicated throughout the ICWA. *See e.g.,* 25 U.S.C. 1902, 1903(1), 1912(b), 1915, 1923.

writ of certiorari should be issued to the court of appeals below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2515

KIOWA TRIBE OF OKLAHOMA, Individually and as Parens Patriae to SETH ALLAN LEWIS,

Plaintiff-Appellant,

v.

ROBERT LEWIS and DIANA LEWIS,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 83-1672)

(Filed: November 21, 1985)

Before BARRETT and LOGAN, Circuit Judges, and FINESILVER, District Judge.*

LOGAN, Circuit Judge.

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* Honorable Sherman G. Finesilver, Chief Judge, United States District Court for the District of Colorado, sitting by designation.

This is an appeal by the Kiowa Tribe of Oklahoma from an order of the district court denying its request for declaratory and injunctive relief under the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1934. The Tribe collaterally attacks a Kansas state court judgment that allowed a non-Indian couple to adopt a child the Tribe contends is an Indian subject to the ICWA requirements. We must consider on appeal the preclusive effect, under the doctrines of res judicata or collateral estoppel, of the state court litigation under the particular facts of this case. We also consider whether the district court erred when it ordered the Tribe to pay the defendant adoptive parents' attorney's fees.

The child involved here was born out of wedlock in Wichita, Kansas, in January 1981. His biological father is Carmon Perciado, a five-eighths blood Indian who is an enrolled member of the Kiowa tribe. The child's mother is a non-Indian, who on the date of birth executed a voluntary consent to the baby's adoption expressly limited to defendants Robert and Diana Lewis. The Lewises on that same day filed a petition for adoption in a Kansas state court and were immediately given temporary care and custody of the child. They removed the child from the hospital and have had custody since. The child's biological father, who was incarcerated in a state penal institution at the time of the child's birth, never saw the child before the Lewises took custody. He was notified of the adoption proceedings, however, and was represented by counsel and participated therein.

During the course of the adoption proceedings the state court became aware of the possibility that the ICWA

might apply. It recessed the proceeding so that the Kiowa Tribe could be notified. The Tribe filed a motion to intervene. It also enrolled the child as a member of the Tribe over the objection of the biological mother. After considering briefs filed by the Tribe and the Lewises, the state court held that the ICWA did not apply and denied the Tribe's motion to intervene on that basis. The court then found Perciado to be an unfit parent, severed his parental rights, and granted the Lewises' adoption petition.

The Tribe appealed the denial of its motion to intervene to the Kansas Supreme Court. That court allowed written briefs and heard oral argument by counsel for the Tribe and the other interested parties. The Kansas Supreme Court affirmed the district court's judgment that the Act was inapplicable. *In re Adoption of Baby Boy L,* 231 Kan. 199, 643 P.2d 168 (1982). The Tribe did not seek review of that decision in the United States Supreme Court.

The Tribe then filed the instant action against the Lewises in the United States District Court for the District of Kansas.[1] That court dismissed the suit on the ground that res judicata and collateral estoppel precluded relitigating the ICWA's applicability. The court also held that the action was frivolous and ordered the Tribe to pay the Lewises' attorney's fees.

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[1] Shortly after the Kansas Supreme Court decision the Tribe filed a suit against the Lewises in the United States District Court for the Western District of Oklahoma, seeking the same relief sought in the instant case. That court dismissed the action for lack of personal jurisdiction over the Lewises.

I

A

By statute, federal courts must give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state in which the judgments were rendered. *See* 28 U.S.C. § 1738; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). We thus must consider first the issue and claim preclusion rules that the Kansas courts apply, *see Marrese v. American Academy of Orthopaedic Surgeons*, — U.S. —, 105 S.Ct. 1327, 1330-35, 84 L.Ed.2d 274 (1985), because the Lewises, defendants in both actions, assert that the Kansas judgment precludes relitigation of the question of the applicability of the ICWA.

We believe the doctrine of res judicata precludes the Tribe from relitigating its claim in this new action. The Kansas courts invoke the res judicata doctrine at least when the following criteria are satisfied: "(1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made." *Adamson v. Hill*, 202 Kan. 482, 449 P.2d 536, 541 (1969).

We believe there is here identity in the thing sued for—in both suits the Tribe primarily contests its right to intervene under the ICWA. The Tribe is again suing to prevent the termination of its rights over the child it

claims is an Indian subject to the ICWA.[2] There is also identity of the cause of action; in both cases the Tribe is seeking to invoke the ICWA. The other two criteria also are present; in both suits the adoptive parents and the Tribe are parties and are aligned as adversaries. There is no material difference in the "quality" of the parties to the two actions. The same facts form the basis of both suits and plaintiff essentially seeks identical relief in both cases: to invoke the Indian Child Welfare Act and prevent the adoption of this baby.

We conclude that the Kansas courts would consider the Tribe's suit here barred by collateral estoppel.

B

The Tribe nevertheless contends that the Kansas Supreme Court decision lacks preclusive effect because the Kansas courts failed to follow the ICWA's procedural standards.[3] The Kansas Supreme Court did apply federal law in its holding that the ICWA's procedures, including those allowing an Indian tribe to intervene in a child custody proceeding, were inapplicable to the facts of this case. *See Baby Boy L,* 231 Kan. at 206-07, 643

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[2] "Identity" of the thing sued for does not require an identically worded complaint. One need only plead in "basically the same manner." *See Kenoyer v. Board of Barber Examiners,* 176 Kan. 424, 271 P.2d 267, 269 (1954).

[3] The ICWA establishes "minimum Federal standards and procedural safeguards in State indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530, 7541; *see also* 25 U.S.C. § 1902. 25 U.S.C. §§ 1911-1922 define some of those minimum standards.

P.2d at 175-76. It concluded that Congress did not intend in the ICWA "to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." *Id.*

It is not enough here for the Tribe to predicate a due process violation on the argument that the Kansas courts did not follow the ICWA's procedures such as letting the Tribe intervene. Congress clearly anticipated that state courts might have to determine, in the first instance, whether the ICWA's terms should apply.[4] A state court determination that the ICWA does not apply is binding on us unless (1) it is "so fundamentally flawed as to be denied recognition under § 1738," *Kremer,* 456 U.S. at 480, 102 S.Ct. at 1897, or (2) unless Congress intended state court judgments concerning the ICWA's applicability to be excepted from § 1738's command of full faith and credit. We examine these questions in sequence.

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[4] If the Tribe is claiming that federal courts should not give full faith and credit to the Kansas state courts' rulings under § 1738 because the Kansas courts lacked jurisdiction to render any judgment concerning the applicability of the ICWA, we reject that argument. The ICWA does not divest state courts of their jurisdiction over children of Indian descent living off the reservation. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530, 7541. Indeed, Congress intended the ICWA to establish minimum procedural standards for state courts handling child custody proceedings involving Indian children. *Id.* The Tribe's argument that the Kansas courts failed to follow the ICWA's minimum procedural requirements does not implicate those courts' jurisdiction; instead, that argument suggests a due process violation that, if true, would divest those courts' judgments of any preclusive effect.

In deciding whether the state courts' judgments were fundamentally flawed, we may only examine whether the state proceedings satisfied "the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer,* 456 U.S. at 481, 102 S.Ct. at 1897. Nothing in the record before us indicates any due process violation in the state courts' determination of the *applicability* of the ICWA. The Kansas trial court considered the issue when it entertained the Tribe's motion to intervene in the child custody proceeding. Prior to ruling on that motion, the trial court gave the Tribe a fair opportunity to present the argument for the ICWA's applicability. *See Baby Boy L,* 231 Kan. at 203, 643 P.2d at 173 (describing proceedings in trial court). After it lost that motion, the Tribe was able to present the same argument to the Kansas Supreme Court and was afforded all the procedural rights of any litigant before that court. The Kansas Supreme Court rejected the Tribe's argument for the ICWA's applicability after giving it extensive attention. *See id.* at 203-07, 643 P.2d at 174-78. The Kansas courts appear to have afforded to the Tribe all the requirements of due process in making their determination that the ICWA did not apply. The Tribe's due process argument based on the ICWA's specific procedures once the ICWA's terms are triggered has no force when a state court has determined the threshold question of the ICWA's applicability adversely to the Tribe and did not violate due process in making that decision. Such is the case here.

C

The Tribe argues that even if 28 U.S.C. § 1738 would otherwise bar it from asserting its ICWA claims anew in federal court, Congress intended to create an exception

to § 1738's rule of full faith and credit by the following statutory language:

> "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

25 U.S.C. § 1914. Sections 1911-1913 are the general substantive provisions of the Act. The Tribe emphasizes the "court of competent jurisdiction" language to support its claim that federal courts may independently consider the propriety of any judicial determination regarding the applicability of the ICWA.

The question before us is not whether the federal court is a "court of competent jurisdiction," entitled to protect an Indian tribe's interest in foster care placement or terminations of parental rights in Indian children in a case in which the tribe sought to assert its rights under the ICWA *before* it sought to intervene in the state proceeding. The question before us is not even whether the Tribe could have brought suit in federal court after the state district court denied it the right to intervene.[5] Rath-

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[5] The Tribe and the biological father did bring an action in the Kansas federal district court to enjoin the state proceedings before the state adoption order was entered. The district court denied relief on the ground that the case was mooted by the state court's prior determination that the ICWA did not apply. R. II, 42, 48. The Tribe took no appeal from the federal court ruling, but instead appealed the state court determination to the Kansas Supreme Court.

er, after its attempted intervention in the state court was denied because the court found the ICWA was inapplicable, the Tribe appealed that determination to the Kansas Supreme Court. There, after full consideration, briefing, and argument, it lost. The question before us is therefore whether the Tribe's taking an appeal to the state supreme court foreclosed the Tribe from relitigating in a later independent federal district court action.

We acknowledge the importance of the Tribe's interest, which was recognized by Congress through its enactment of the ICWA. But we do not agree with the Tribe's argument that 25 U.S.C. § 1914 makes inapplicable the full faith and credit provisions of 28 U.S.C. § 1738. The Supreme Court has emphasized that an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal. *Kremer,* 456 U.S. at 468, 102 S.Ct. at 1890. Nothing in the ICWA expressly creates an exception to § 1738, and we do not read § 1914 as implicitly authorizing federal courts to adjudicate custody of Indian children independently after a state court has rendered a final judgment, in litigation in which the interested Indian tribe has participated. This is a case like *Angel v. Bullington,* 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947), in which the Supreme Court held that the only recourse of a litigant who took the state court route was to continue by an appeal or petition for certiorari to the United States Supreme Court, a course it did not take.

Congress intended the ICWA to set minimum standards and procedural safeguards for state child custody proceedings. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530,

7541. In setting such standards, Congress evidently believed that an Indian child's tribe should be involved in the process even when the proceedings are in state courts rather than tribal courts. *See, e.g.*, 25 U.S.C. §§ 1911(b), (c), 1912(a), 1915(c), 1919(a). Thus Congress clearly realized that state courts would continue to resolve some cases of Indian child custody. Section 1911(c) expressly gives the child's Indian tribe the right to intervene in state court proceedings involving the child's custody. We cannot read § 1914's reference to "any court of competent jurisdiction" as the type of clear and manifest authorization that federal courts need before they upset the ordinary principles of federal-state comity embodied in 28 U.S.C. § 1738 and the Full Faith and Credit Clause. It seems rather to state simply where such actions may initially be brought. Regardless of whether we agree with the Kansas Supreme Court's construction of the ICWA, here we must honor the judgment it has rendered on the subject.

II

The Tribe contends that tribal sovereign immunity bars the district court's award of attorney's fees against it. We do not decide that issue. Rather we reverse the district court's determination on a narrower ground also asserted by the Tribe. Apparently the district court based its award either on 42 U.S.C. § 1988, because the Tribe asserted one cause of action based upon the Civil Rights Act, or on the court's general power to discourage frivolous lawsuits. Although we have agreed with the district court's dismissal of the suit, we find the case to be neither "frivolous, unreasonable, or without foundation,"

as required before an attorney's fee award can be made under § 1988, nor brought in subjective bad faith, as required for an award under the general common law fee award power. *See Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 419, 421, 98 S.Ct. 694, 699, 700, 54 L.Ed.2d 648 (1978). The question here of whether the ICWA, particularly § 1914, creates an exception from the normal issue or claim preclusion rules appears to be one of first impression, at least at the circuit level. First impression issues, if substantial, should not support an attorney's fee award against a losing plaintiff. *See id.* at 423-24, 98 S.Ct. at 701.

As evidence of the seriousness of the issue, we note that another federal district court in this circuit, in a somewhat different factual situation, found that it had jurisdiction under the ICWA after an Indian tribe had tried unsuccessfully to intervene in state court adoption proceedings. *See Kickapoo Tribe v. Department of Human Services,* No. 81-947-T, slip op. (W.D. Okla. Aug. 10, 1984), *appeal docketed,* No. 84-2279 (10th Cir. Sept. 18, 1984). We also note that at least one other state appellate court apparently has disagreed with the Kansas Supreme Court's decision on the merits of the applicability of the ICWA in an analogous case. *In re Appeal in Maricopa County Juvenile Action No. A-25525,* 136 Ariz. 528, 667 P.2d 228, 233 n.5 (Ct. App. 1983). We therefore reverse the award of attorney's fees.

In all other respects, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2515

(D.C. #83-1672)

SEPTEMBER TERM—November 21, 1985

Before Honorable James E. Barrett, Honorable James K. Logan, Circuit Judges, and Honorable Sherman G. Finesilver*

KIOWA TRIBE OF OKLAHOMA, Individually and as Parens Patriae to SETH ALLAN LEWIS,

Plaintiff-Appellant,

v.

ROBERT LEWIS and DIANA LEWIS,

Defendants-Appellees,

KICKAPOO TRIBE OF OKLAHOMA; COMANCHE INDIAN TRIBE; SEMINOLE NATION OF OKLAHOMA; ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA; IOWA TRIBE OF KANSAS AND NEBRASKA; COEUR D'ALENE TRIBE; MENOMINEE INDIAN TRIBE OF WISCONSIN; SISSETON-WAHPETON SIOUX TRIBE; KICKAPOO TRIBE OF KANSAS; and THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS OF ALASKA; ASSOCIATION OF AMERICAN INDIAN AND ALASKA NATIVE SOCIAL WORKERS, INC.; and OKLAHOMA INDIAN CHILD WELFARE ASSOCIATION; NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN and MS. T.M.L.,

Amici Curiae.

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* Chief Judge of the United States District Court for the District of Colorado, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part. It is ordered that the judgment of the United States District Court for the District of Kansas is reversed in part. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this Court.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM—March 6, 1986

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges and Honorable Sherman G. Finesilver, U.S. District Judge*

Case No. 83-2515

KIOWA TRIBE OF OKLAHOMA, Individually and as Parens Patriae to SETH ALLAN LEWIS,

Plaintiff-Appellant,

vs.

ROBERT LEWIS and DIANA LEWIS,

Defendants-Appellees,

KICKAPOO TRIBE OF OKLAHOMA; COMANCHE INDIAN TRIBE; SEMINOLE NATION OF OKLAHOMA; ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA; IOWA TRIBE OF KANSAS AND NEBRASKA; COEUR D'ALENE TRIBE; MENOMINEE INDIAN TRIBE OF WISCONSIN; SISSETON-WAHPETON SIOUX TRIBE; KICKAPOO TRIBE OF KANSAS; and THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS OF ALASKA, ASSOCIATION OF AMERICAN INDIAN AND ALASKA NATIVE SOCIAL WORKERS,

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* of the United States District Court for the District of Colorado, sitting by designation.

INC., and OKLAHOMA INDIAN CHILD WELFARE ASSOCIATION, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN and MS. T.M.L.,

Amici Curiae.

This matter comes on for consideration of appellee's petition for rehearing and appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the Court orders as follows:

1. The petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The court was polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure. The suggestion for rehearing en banc is denied.

Judge McKay voted to grant rehearing en banc.

/s/ Howard K. Phillips, Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-909

KIOWA TRIBE OF OKLAHOMA,

Applicant,

v.

ROBERT LEWIS AND DIANA LEWIS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 20, 1986.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of May, 1986.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Case No. 83-1672

KIOWA TRIBE OF OKLAHOMA,

Plaintiff,

vs.

ROBERT and DIANA LEWIS,

Defendants.

TRANSCRIPT OF COURT'S RULING

On the 28th day of October, 1983, came on to be heard Defendant's Motion to Dismiss in the above-entitled and numbered cause before the HONORABLE PATRICK F. KELLY, Judge of the United States District Court for the District of Kansas, Sitting in Wichita. The following is the ruling of the Court.

THE COURT: All right. Thank you, Mr. Howard.

Let me say at the outset that I deliberately tracked what I perceive to be the issues when I came to the bench, and did so principally because they were those issues that we have given considerable thought and weight as to the pending motion and its application.

I think as I listened to both of you, both of you have also suggested that there may be other arguments left in your briefs and perhaps neither of you have directly addressed each that I identified. Your arguments are helpful but they change nothing. I have given thought to this matter frankly since June 26th when it was brought first

to my attention and have tracked this case as one might naturally do having had an interest to the extent that I did at the time of that hearing and at which time I believe I correctly held that this matter was then properly before Judge Malone and was underway in the adoptive proceeding.

Now, in the interest of clarity, however, I'm going to track again the issues and follow for some part our own thoughts as to what is important, perhaps what is not important, what's been raised, what's been done elsewhere and its significance here.

I indicated that I saw the first argument of the plaintiff under Section 1914 of the Act as some kind of a statutory exception to the res judicata doctrine, such that the statute disallows res judicata or collateral estoppel defenses to Federal Court review of previous State Court adjudication.

I have to conclude that such a thesis is wholly legally unsound. The language of the statute and the history do not support a result certainly as dramatic as the exception to the doctrine of res judicata or estoppel.

Convinced, Mr. Hirsch, that if Congress intended an exception to these rather well-established legal doctrines, the language on the face of the statute and in the history would say so or would be more clear.

Tracking Section 1914, it states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and Indian

child's tribe may petition any Court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of certain sections being 11, 12, 13 of that Act.

Now the legislative history of the section reads: Section 1914 authorizes the child, parent or Indian custodian or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under the Sections 1911, 12 or 13 were violated.

I read this Act and the legislative history as defining the interested parties in foster and adoption proceedings involving Indian children. The section vests rights in or confers standing upon the child, parent, custodian or tribe to initiate judicial actions, to intervene in pending judicial action or to require a readjudication when the Act was never considered in the first place. And I cannot, however, read the statute to mean that a party contesting a foster placement or termination of parental right has access to Courts in a manner that contravenes well-established judicial procedures such as res judicata principles.

Now, in support of your argument that Section 1914 permits Federal Courts to relitigate a matter previously litigated where the Act was considered—that is, the Indian Child Welfare Act—you have cited the history decrying the insensitivity of the State Courts and agencies to the cultural mores of the Indian, American Indian, and I'm sure in days past in studying history of State Courts, State Courts have been insensitive, but seems to me that for that very reason this Act was enacted in order to provide State and Federal Courts with minimum standards for

the adoption and foster placement of Indian children. In other words, the Act itself is the antidote to the State's insensitivity. In that sense, the State Courts do have a duty to enforce the Act, as they must enforce all Federal law.

I certainly do not believe that the language of 1914 is clear or sufficiently clear to construe it as an exception to the fundamental principles of federalism and comity that preclude Federal Courts from hearing matters previously litigated in State Court if the Act applies.

Now, what cannot be ignored, seems to me, is the clarity, the comprehensive clarity of the Supreme Court's decision; that's the case of *In Re: Adoption of Baby Boy L.* at 231 Kansas. I think I would be remiss if I don't make some reference to aspects of it in the interest of that clarity.

I tracked the facts of the case from the outset, taking them essentially from the case. Judge Malone's findings are about as clear and comprehensive as anyone could reasonably expect. He addressed every issue that you have raised here, I think, in the hearing, at which time he denied intervention. Section 4 of his findings covers A through I and E says:

The issues of preservation of the Indian family is not involved as the child has never been a part of any Indian family relationship.

Now, to this the Supreme Court says:

We conclude the trial Court was correct in its determination that the Indian Child Welfare Act by its own terms does not apply to these prcoeedings and therefore

its rulings on the various petitions filed by the appellate were correct. The overriding concern of Congress, the Supreme Court concluded, and the proponents of the Act was the maintenance of the family and tribal relationship existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant whose never been a member of an Indian home or culture and probably never would be should be removed from his primarily cultural heritage and placed in an Indian environment over the expressed objection of his non-Indian mother.

Now, if this were my case to decide, Mr. Hirsch, those would be precisely my findings. I would hold specifically and so that no one will ever misunderstand, I do not believe that the Congress ever contended this Act to remotely apply to the facts of this case. But what is important to me, sir, is that I don't have to decide that because the Supreme Court of Kansas, to whom I am bound, has made that finding, and res judicata applies in this case, and the Supreme Court of Kansas has held that the Indian Child Welfare Act does not apply in this case, and I concur with it, and I readily follow it.

Now, with that said, I don't know what else needs to be said so far as deciding this matter, but you have succinctly addressed some other issues and I will track those.

You have argued that the parties in the State Court differ from the parties in this case. You say that the tribe was never a party in State Court because your motion to intervene was denied.

I find that an incredulous argument. I have tracked and I did appreciate you're handing me the transcript. You were most welcome to appear in the Probate Court as an attorney. You were permitted to argue as you were here. All the Court said was that after having received the briefs, as I understand it, it was stipulated as to the circumstance. I don't know if there was a full argument, but, Mr. Hirsch, you were a party to it. When all of that was done, he simply said: The Indian Act does not apply and you may not intervene. From that, sir, you took an appeal to the Supreme Court. You're the attorney for the tribe. The tribe is a party to the action. You had the opportunity to argue this matter to the Supreme Court, and call it what you will, the rights of the Indian tribe as to whatever claim they have under the Act have been fully heard by the Supreme Court and fully adjudicated so far as I'm concerned.

Now, you have argued that the parties differ because the tribe appears in this case in a different capacity than it appeared in the State Court. Perhaps I have addressed that. I think it's a distinction without a difference. I think it's clearly illusory. I would tell you and I would find that the rule is when an entity was a party or was in privity with a party to a previously adjudicated action, then res judicata bars relitigation. The defendants in their briefs have pointed out that this is a matter of substance over form, and I think I have just indicated I concur with that. They list factors which determine when an entity is considered to be in privity with a party in the former action, and I concur with that.

They suggest that the requisites to be considered are whether a party is so closely related to a party to a prior

proceeding to border on identity with or to be a virtual representative of; or whether the entity asserts the same rights or interests adjudicated by the former party; whether the same counsel represented the former and the present party; and whether the present party influenced how the prior action proceeded.

In this case the rights and the interests of the tribe as an individual, or parens patriae to Seth Lewis, or parens patriae to members of the tribe are substantially or virtually identical in relation to the Act's claim and other Federal claims that are before me and in issue.

In substance, the interest presented in both the State case and in the Indian Child Welfare Act and the Non-Indian Child Welfare Act claim is that of instilling Indian culture and heritage on the lad, and this is my view, and I so find was fully litigated in the State Court. Distinction as to the form of the parties that the plaintiff urges, as I have said, I think is fully illusory and certainly no ground for the denial of the res judicata or collateral estoppel defenses.

There was another issue, and I think it's deserving to be addressed. You argue that the causes of action and the issues presented in this case differ from those litigated in the State Court and again res judicata or collateral estoppel is no defense.

As to the Indian Child Welfare Act claim, I think that the defendants in their briefs and in their arguments state the prevailing argument, and that is that the plaintiff or the tribe attempts to avoid res judicata or collateral estoppel effect of the Sedgwick County District Court judgment by arguing plaintiff now challenges the final

adoption of Seth Allan under the Act, whereas before it was only litigated as to its right to intervene and the applicability of the Act. Makes no sense at all.

I concur that the plaintiff has no basis nor right to here challenge the final adoption of this lad. The applicability of the Act to the facts of this case has been fully and finally adjudicated and I agree with the defendant: Because the Act simply does not apply, you cannot now assert rights thereunder.

If you will, there's some authority that I think was helpful and is partially dicta out of the Tenth Circuit which would suggest that it's true that because collateral estoppel is grounded on public policy, particularly as it related to judicial economy, some Courts have not limited its application to adjudicated claims only, and points out in *Plastic Container Corporation* at 607:

Essential element of collateral estoppel is substantial identity of the issue or issues in each action. Consistent with that guideline, I have no hesitancy in finding a substantial identity of issues here.

There are some other, what I guess we have all captioned as Non-Indian Child Welfare Act claims. The rule is that res judicata bars federal law and constitutional claims even if these claims were not asserted in the state proceeding if the parties are the same, the claims are based on the same asserted wrong. Here the parties are the same and the asserted wrong is the same. You suggest the failure to place Seth Lewis in a home that would instill Indian culture in his upbringing. These claims are based, as I understand it and I tracked them—that's why I interjected I didn't understand the Tenth Amendment

was raised by the Plaintiff—you suggest the Indian Self-Determination Act, 1867 Treaty with the Kiowas, constitutional claims based on the First, Fifth and Ninth Amendments, federal law concerning the Indians and the tribe's parens patriae relation to minor tribe members, and Section 1983 of the Civil Rights Act.

You state that the interest protected by all of these causes of action is the tribe's interest in transmitting Indian culture and heritage to the children and members of the tribe. Seems to me these claims could and should have been included in the State Court proceeding because all of them are based on and are substantially identical to the wrongs that were suggested, alleged and litigated in State Court.

You did cite a case called *Hoggro versus Pontesso,* a Tenth Circuit decision. You stated it was of some authority, which states that a claim alleging infringement of constitutional rights must be heard on the merits. As I recall, that was a prisoners alleged infringement of various constitutional rights that related to the refusal to practice the Muslim religion. As I recall, the Federal Court dismissed it without a hearing on the grounds the same issues had been litigated and the Circuit Court held the constitutional claims must be heard on their merits.

I have taken that to be in part the thrust of your argument. Seems to me that in this case you have had your hearing, fully and fairly, and that distinguishes the *Hoggro* case. It may be if you were somewhere else to argue that you didn't get to argue the matter before Judge Malone, if you didn't I think that was your fault. Seems to me it was agreed to stipulate—I'm uncertain on why,

but briefs were submitted, the Judge took it up and he decided it. Isn't any question in my mind, and as I read the journal entry in Judge Malone's case and his decision was heard on the merits of the rights of the tribe. At least he provides in part in his journal entry that it was heard and decided on the basis of the briefs, the pleadings at the request and stipulation of the parties.

In every event, seems to me, Mr. Hirsch, Supreme Court of Kansas, ultimate authority in this state and to whom I said I feel bound—and in this case happily so—they meticulously considered every claim you raised. Seems to me then in this you have had an adequate hearing on the merits of your claim.

You have raised some other issues that suggest lastly, I guess, that the principles involved require the Court to bar res judicata and collateral estoppel. I find no basis for arguing that the State Court proceedings were fundamentally unfair and I take it from your argument and I asked you about it in your argument of how it could be. Just seems to me that the Court provided the tribe with a full and fair opportunity procedurally, substantially and evidentially to pursue your claim.

You cited some cases, one of which was Supreme Court of the United States in *Blonder* at 402 U.S., and the Court's statement that a party's opportunity to present evidence is an important factor to determining a fair opportunity, as if to say at some point somebody should have heard you and some evidence. You indicated that you would have presented evidence regarding the social, cultural and psychological affects of adoption of an In-

dian child and the importance to the child of a continuing relationship with the tribe.

No one argues that. My findings here are not at all intended to demean the good intention of the Act, the desires of those of Indian heritage to preserve it in their culture, but the State Court here considered all of the case and no one can fairly suggest that that proceeding was fundamentally unfair.

You have said that res judicata is no defense because the Kansas Court lacked jurisdiction over the adoption proceeding. I think I have probably addressed that when I commented earlier from the facts of the case and perhaps in the course of argument.

I think that argument, Mr. Hirsch, is absolute nonsense. There is no provision in the Act for tribal jurisdiction under the facts of this case. Simple as that. Section 1911(a) confers jurisdiction over the child when he is residing on the reservation. Section 1911(b) confers jurisdiction on the tribe if the child is not residing on the reservation but only if one or both of the parents do not object. Here clearly the natural mother objected and there's no way the tribe has jurisdiction over this proceeding, and I believe that the Supreme Court of Kansas clearly had jurisdiction over the matter.

Last issue you raised, as I would recall it, was to suggest to me that the overriding Federal concern for the protection of the American Indian supersedes the doctrine of res judicata and collateral estoppel. And I think I picked at you enough that I had you understand that I could not accept that it is ever the intent of the Congress nor remotely inferred in this Act that this Court somehow,

some way should intervene, set aside, ignore the decision of the Supreme Court of Kansas in its jurisdiction, who has fully considered and adjudicated the question. You did cite the *Red Fox* case, 9th Circuit, and that Court's dicta is that the strong Federal concern for the protection of the Indian will not bar on the grounds of res judicata the relitigation of the claim if the previous adjudication is transparently erroneous.

In the course of your argument I wanted to ask you: Where in the world can anyone reasonably ask or suggest that that rather clear, concise, wholly comprehensive, full and complete decision could be transparently erroneous? I could not accept that, Mr. Hirsch, because I'm convinced it is just as I have identified it: It is full, fair, comprehensive, complete, and I'm bound by it.

With that said, you have raised two other issues: First you simply argue that under any circumstances the Act applies and that it is constitutional. I'm convinced I needn't reach those questions because, Mr. Hirsch, I say to you in behalf of the tribe, I am absolutely convinced that collateral estoppel applies; that I'm duty-bound to receive the decision of the Supreme Court as binding; it's res judicata to the facts of this case; that the Indian Child Welfare Act does not apply to this case. The Kiowa Indian Tribe has absolutely no right as of this moment to in any way interfere with the life of this lad, this young boy, Seth. He is now the adoptive son of the defendants; that that family now has full care, custody and his control, and until and unless they are predisposed to share his life with the tribe, it's intended and contemplated that this tribe will no further interfere with his life.

Now, that's the findings of the Court, upshot of which is to say that the motion of the defendant to dismiss this case is sustained. Costs of the matter are assessed to the plaintiff.

Is there anything else?

MR. HOWARD: Not at this time, Your Honor. We'll probably have a separate motion under the local rules to assess as part of the costs the inordinate expenses to which we have been—my clients have been put as a result of this litigation.

THE COURT: Have you shared those expenses with Mr. Hirsch?

MR. HOWARD: I'm sorry?

THE COURT: Have you shared your invoice with Mr. Hirsch or your statement?

MR. HOWARD: No, I haven't. I will take it up or file it in an appropriate fashion.

THE COURT: I think in contemplation of it, I will entertain it. I would agree that it is the kind of case that would authorize attorney fees and costs of litigation to the prevailing party, here the defendants. I say that because I'm convinced that having read the Supreme Court's decision and to appreciate its finality, to proceed further, as has conducted here, was useless, as did the Supreme Court of Kansas, seems to me, suggests that in the course of its decision, if not frivolous, and, if you will, Mr. Howard, it's my practice and I would appreciate you simply share it with Mr. Hirsch. He is a responsible lawyer. He may not agree with my decision, but I would think first

he could at least agree as to the reasonableness of whatever it is you submit. If you can do that timely, if there is then disagreement, simply get it to me. All right?

MR. HOWARD: We will do so, Your Honor.

THE COURT: Very well. We will be in recess.

APPENDIX F

The Indian Child Welfare Act of 1978, Pub. L. 95-608, Tit. I (with the exclusion of sections 107, 108 and 113) and section 201(a), 92 Stat. 3069-3076, 25 U.S.C. 1901 *et seq.*, provides:

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for mem-

bership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or in-

dividual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian Tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either

parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided,* That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge. shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State Court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided

in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided,* That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding

subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and

agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such

child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

No. 85-2089

In the Supreme Court of the United States

OCTOBER TERM, 1985

KIOWA TRIBE OF OKLAHOMA,
Petitioner,

vs.

ROBERT LEWIS and DIANA LEWIS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner fails to raise any issue warranting review by the United States Supreme Court on writ of certiorari where the United States Court of Appeals for the Tenth Circuit properly applied the fundamental principles of *res judicata,* collateral estoppel, and 28 U.S.C. § 1738, consistent with prior decisions of this Court, to affirm the dismissal of petitioner's action.

2. Whether the United States Court of Appeals for the Tenth Circuit properly affirmed the dismissal of petitioner's action where petitioner had previously litigated the same issues and claims in the State Courts of Kansas, and failed to appeal the judgment of the final judgment of the Kansas Supreme Court.

3. Whether the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.,* is an exception to 28 U.S.C. § 1738 or the jurisprudential precepts of *res judicata* and collateral estoppel so as to permit petitioner to relitigate in the federal courts issues which were previously fully determined in the State Courts of Kansas.

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The United States District Court for the District of Kansas dismissed petitioner Kiowa Tribe of Oklahoma's action, Civil Action No. 83-1672, in an unreported bench ruling on October 28, 1983. (Petition for Writ of Certiorari, App. E.) The United States Court of Appeals for the Tenth Circuit affirmed the dismissal of the action in *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985). (Petition for Writ of Certiorari, App. A.)

The Kiowa Tribe's federal action is an attempt to attack collaterally the Kansas Supreme Court's decision in *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982), a copy of which was filed with the Court in conjunction with the Petition for Writ of Certiorari.

STATEMENT OF CASE

The following uncontroverted facts are reflected in the opinion of the Tenth Circuit and the 1982 opinion of the Kansas Supreme Court, *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982). Prior to the filing of the Complaint in this case by the Kiowa Tribe, the prior judicial proceedings in the Kansas courts were conducted by reference only to "Baby Boy L." in order to protect the identity of the child and mother as required by Kansas law. However, the identity of the parties is now a matter of record in the courts below and we shall therefore refer to the individuals by their proper names.

Seth Allan Lewis was born in Wichita, Kansas, on January 29, 1981. He was the out-of-wedlock child of Carmon Perciado and Ms. T.M.L. Carmon Perciado has

a Kiowa blood degree of five-eighths and is an enrolled member of the Kiowa Tribe. Ms. L is non-Indian. At the time of Seth's birth and continuing thereafter, Perciado was incarcerated at the Kansas State Industrial Reformatory. He never saw or had custody of the baby. On January 29, 1981, and again on April 14, 1981, Ms. L. executed a voluntary consent to the adoption of her baby. She expressly limited both consents to adoption only by the named prospective parents, respondents herein Robert and Diana Lewis. (*In re Baby Boy L.*, 231 Kan. at 201-02, 205, 212, 643 P.2d at 172-73, 174, 180.)

The petition for adoption and Ms. L.'s first consent were filed January 29, 1981, in the probate division of the Sedgwick County, Kansas District Court. The court granted Mr. and Mrs. Lewis temporary care and custody of Seth. Thus, since birth, the child, who is now five and one-half years old, has always lived with and been cared for by his parents, Robert and Diana Lewis. (*In re Baby Boy L.*, 231 Kan. at 201-02, 643 P.2d at 172-73.)

Notice of the adoption proceeding was served personally on Carmon Perciado at the Kansas State Industrial Reformatory. Perciado filed an affidavit of indigency and the court appointed counsel. On March 30, 1981, proceedings began in Sedgwick County District Court to determine the fitness of Perciado as a parent. The court was advised on April 1, 1981, that the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (ICWA or Act) might apply. The Kansas trial court judge continued the proceeding so that notice could be given to petitioner herein, Kiowa Tribe of Oklahoma. (*In re Baby Boy L.*, 231 Kan. at 202, 643 P.2d at 172-73.)

The Kiowa Tribe filed a motion to intervene on May 8, 1981. On May 13, 1981, Ms. L. discovered that the

Kiowa Tribe intended to enroll Seth as a minor member of the Tribe. She objected to the enrollment in a letter received by the Tribe on May 15, 1981. Despite this, and without further notice to, or the presence of Ms. L. or Robert or Diana Lewis, the Kiowa Tribe unilaterally attempted to enroll Seth as a tribal member on May 16, 1981. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173.)

Counsel for all interested parties, including the Kiowa Tribe, filed briefs with the Sedgwick County District Court on the applicability of the ICWA to the facts of the case. After examining the briefs and court file, the court denied the Tribe's motion to intervene on June 22, 1981, and held the ICWA was not applicable under the factual circumstances surrounding the birth of Seth Lewis. The court, however, permitted counsel for the Tribe to sit with and advise counsel for Carmon Perciado. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173.)

On June 22, 1981, the Kiowa Tribe, by oral application, petitioned the United States District Court for the District of Kansas for a restraining order enjoining the state court from deciding the adoption of Seth Allan Lewis. The United States Court denied the restraining order and deferred to the jurisdiction of the Kansas state courts, and the Tribe did not appeal that decision. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 592 n.5 (10th Cir. 1985). (Petition for Writ of Certiorari, App. A at App. 8 n.5.)]

Thereafter the Sedgwick County District Court found Carmon Perciado to be an unfit parent and severed his parental rights, in part due to his alcohol and/or drug abuse, his history of violence, and his criminal record.

(*In re Baby Boy L.*, 231 Kan. at 211-12, 643 P.2d at 173.) The Kiowa Tribe does not challenge the propriety of severing Perciado's rights in this action. (*See* Petition for Writ of Certiorari at i.)

The Sedgwick County District Court then proceeded with the adoption petition filed by Robert and Diana Lewis. The court found Ms. L.'s voluntary consent to adoption valid and Mr. and Mrs. Lewis suitable parents. The court therefore granted the adoption petition on June 24, 1981. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173-74.)

The Kiowa Tribe, Carmon Perciado, and Perciado's parents appealed to the Kansas Supreme Court. Mr. Bertram E. Hirsch, counsel for petitioner herein, filed the Tribe's brief and personally appeared before the Kansas Supreme Court to argue the Tribe's position. The Kansas Supreme Court held that the ICWA does not apply to the facts of this case after making a detailed analysis of those facts in light of the stated purpose of the Act, *i.e.*, "the maintenance of the family and tribal relationships existing in Indian homes and to set minimal standards for the removal of Indian children from their existing Indian environment." (*In re Baby Boy L.*, 231 Kan. at 205-06, 643 P.2d at 175.) The Kansas Supreme Court held that the adoption of Seth could not and did not remove him from an existing Indian environment in that at the time of his adoption, Seth was almost five months old and always had lived with his adoptive parents, Robert and Diana Lewis; that his biological mother had expressly limited her consent to adoption by Mr. and Mrs. Lewis and made it clear she would retain custody if the Lewises were not granted the adoption; and, that Seth was never a member of an Indian family or community, nor did it appear he would ever become a member of such.

The Kansas Supreme Court therefore expressly held that under such circumstances the ICWA does not apply. (*In re Baby Boy L.*, 231 Kan. at 206-09, 643 P.2d at 175-77.) Counsel for the Kiowa Tribe did not even attempt a timely appeal of that judgment to this Court in 1982. The Tribe attempted to attack the Kansas Supreme Court judgment collaterally by filing an action against Mr. and Mrs. Lewis in the United States District Court for the Western District of Oklahoma on September 10, 1982. By order filed April 22, 1982, Judge Russell of the Western District of Oklahoma dismissed the Kiowa Tribe's action for lack of personal jurisdiction over the Lewises. [*See Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 590 n.1. (Petition for Writ of Certiorari, App. A at App. 3.)]

On July 5, 1983, the Kiowa Tribe again attempted a collateral attack on the judgment of the Kansas Supreme Court by filing this action in the United States District Court for the District of Kansas. It is virtually identical to the action it filed in the Oklahoma federal district court. Robert and Diana Lewis moved to dismiss the action as barred by *res judicata* and collateral estoppel. In an order and judgment entered October 28, 1983, Judge Kelly of the United States District Court for Kansas, granted the Lewises' motion to dismiss and held the action clearly was barred by the Kansas Supreme Court decision in *In re Baby Boy L.* The court also found the action was frivolous and useless and that Mr. and Mrs. Lewis were entitled to an award of costs and attorneys' fees. (Transcript of Bench Ruling; Petition for Writ of Certiorari, App. E at App. 28-29.)

The Tribe appealed to the United States Court of Appeals to the Tenth Circuit. The Tenth Circuit affirmed the district court and held the action was barred by the

Kansas state court proceedings and in light of decisions of the United States Supreme Court. The Tenth Circuit reversed, however, the award of costs and attorneys' fees. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 593. (Petition for Writ of Certiorari, App. A at App. 11.)]

SUMMARY OF ARGUMENT

The Kiowa Tribe's petition for writ of certiorari should be denied because it raises no issues or claims warranting review by this Court. In affirming the dismissal of the Tribe's action against Mr. and Mrs. Lewis, the Tenth Circuit applied the fundamental principles of issue and claim preclusion as these principles are embodied in 28 U.S.C. § 1738. The court properly held that the Tribe's act of appealing a state trial court decision to the state supreme court barred the Tribe from collaterally attacking the state supreme court decision in an independent federal action. The court also properly found that the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, does not create expressly or impliedly an exception to 28 U.S.C. § 1738.

ARGUMENT AND AUTHORITIES

I. The Jurisprudential Precepts Raised by Petitioner Do Not Require Review by This Court.

Pursuant to Rule 17 of the Rules of the Supreme Court of the United States, only "special and important reasons" will justify review by this Court on writ of certiorari. None of the exemplary reasons listed in Rule 17, or any other reason, would support review of the Kiowa Tribe of Oklahoma's petition for writ of certiorari.

The Tenth Circuit opinion in this case is not in conflict with other federal appellate courts or with any decisions of this Court. To the contrary, the Tenth Circuit applied the substantial body of law regarding finality of judgments and comity in affirming the dismissal of the Kiowa Tribe's action and specifically followed several decisions of this Court.

The Tribe would herald this case as raising issues of national concern and public policy requiring Supreme Court review. This case does indeed involve important public policy: the public's and ultimately Mr. and Mrs. Lewis' and their son Seth's interests in the finality of judgments, the end to litigation, and the preclusive effect federal courts give state court proceedings. While the preclusive effect of final judgments and the comity principles embodied in 28 U.S.C. § 1738 are important and significant matters, their application in this case is clear in view of well settled law. The Kiowa Tribe therefore fails to raise any issues requiring or justifying Supreme Court review.

II. The Kiowa Tribe's Action Was Properly Dismissed When, As a Matter of Law, the Action Is Barred by the Doctrines of Res Judicata and Collateral Estoppel.

A. *Federal courts will give preclusive effect to matters decided by state courts.*

Res judicata and collateral estoppel promote judicial economy and bring a finality to judgments by barring the relitigation of claims or causes of actions that were or could and should have been raised and determined in another action. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Mancuso v. United*

States, 464 F.2d 1273, 1275 (10th Cir. 1972); *Williams v. Evans,* 220 Kan. 394, 396, 552 P.2d 876, 878 (1976).

As recognized by the United States Supreme Court, and by the Tenth Circuit below, the concepts of *res judicata* and collateral estoppel are embodied in the full faith and credit provisions of 28 U.S.C. § 1738. Federal courts must give preclusive effect to matters decided by state courts in order to ensure conclusive adjudications and promote comity. *See Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 466 n.6, *reh'g denied,* 458 U.S. 1138 (1982); *Montana v. United States,* 440 U.S. 147, 153, 163 (1979).

The need for conclusive adjudication is particularly clear in child custody or adoption matters. This Court has held that federal courts must give *res judicata* and collateral estoppel effect to state court child custody proceedings to preserve the security and stability that are essential for childhood development.

> The state's interest in finality is unusually strong in child-custody disputes. . . . It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. *Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions.* [*Leham v. Lycoming County Children's Services Agency,* 458 U.S. 502, 513-14 (1982) (Emphasis added.)]

B. *The Kiowa Tribe's action properly was barred by the prior Kansas state court proceedings and was properly dismissed.*

The Kiowa Tribe filed this action in the United States District Court for the District of Kansas in a belated third attempt to challenge the Kansas state courts' denial of the Tribe's claims under the Indian Child Welfare Act. The district court held that the Tribe's action was an impermissible collateral attack on the final judgment of the Kansas Supreme Court and dismissed the Tribe's complaint.

In affirming the district court, the Tenth Circuit held the action was barred by the doctrines of issue and claim preclusion and in view of decisions by the United States Supreme Court. The Tenth Circuit specifically found the case and the Tribe's course of conduct to be similar to that in *Angel v. Bullington*, 330 U.S. 183 (1947). [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 592. (Petition for Writ of Certiorari, App. A at App. 9.)] In *Angel*, Bullington appealed a state trial court decision to the state's supreme court. He thereafter filed a suit in federal court on the same claim, appealed to the circuit court of appeals and then to the United States Supreme Court. 330 U.S. at 185.

In *Angel*, this Court held that the federal action was barred by *res judicata*. This Court further held that by appealing the state trial court decision to the state supreme court, the litigant's only proper recourse to pursue his claims further was to seek review by the United States Supreme Court. Even though Bullington did not exercise right to seek such review, he was barred from beginning the suit anew in a new forum. 330 U.S. at 190.

> If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. [*Id.* at 189.]

See also Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); *Allen v. McCurry,* 449 U.S. 90, 101 (1980).

As in *Angel,* the Kiowa Tribe is barred by *res judicata* and collateral estoppel to attack collaterally the denial of its motion to intervene in the state court proceedings or to challenge otherwise the now five year old adoption decree. The Sedgwick County District Court found the ICWA inapplicable to the case and the Tribe to be *without any* rights in the adoption proceedings. The Tribe appealed to the Kansas Supreme Court, which affirmed. At that point, as in *Angel,* the Tribe's only recourse was to seek review by the United States Supreme Court or accept the judgment and thereby finally conclude its litigation.

Counsel for the Kiowa Tribe made the conscious, strategic decision not to seek review of the Kansas Supreme Court judgment. The Tribe instead chose to attempt a collateral attack on the judgment in federal court. The district court and the Tenth Circuit properly held that by choosing to pursue the matter through the Kansas state courts, the Tribe's action was barred and the decision of the Kansas Supreme Court entitled to preclusive effect by the federal courts. [*Kiowa Tribe of Oklahoma v. Lewis,* 777 F.2d at 591-92. (Petition for Writ of Certiorari, App. A at App. 8-9.)] *See Cotton v. Federal Land Bank of Columbia,* 676 F.2d 1368 (11th Cir.), *cert. denied,* 459 U.S. 1041 (1982); *United States v. Epstein,* 608 F.2d 1

(D.C. Cir. 1979); *Tomsick v. Jones,* 464 F. Supp. 371 (D. Colo. 1979).

C. *The judgment of the Kansas Supreme Court is valid.*

The Kiowa Tribe contends the Kansas Supreme Court judgment is not entitled to preclusive effect because it is invalid for failing to comply with the ICWA. (*See* Petition for Writ of Certiorari at 25.) The Tenth Circuit held that pursuant to *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, *reh'g denied,* 458 U.S. 1133 (1982), a federal court will only examine whether the minimum procedural due process requirements of the fourteenth amendment have been satisfied to determine if a state court's judgment is so "fundamentally flawed" as to prevent preclusive effect. [*Kiowa Tribe of Oklahoma v. Lewis,* 777 F.2d at 591. (Petition for Writ of Certiorari, App. A at App. 7.)]

Before determining whether the ICWA applied to the facts of this case, the Kansas state courts afforded the Kiowa Tribe complete due process. *First,* once the trial court was advised that the ICWA might apply, the state court proceedings were recessed so that the Kiowa Tribe could be given notice of the proceedings. *Second,* the Tribe was given the opportunity to present its arguments both orally and by brief. The trial court considered these arguments before ruling on the Tribe's motion to intervene and the applicability of the ICWA. After denying the motion and holding the ICWA inapplicable, the court allowed counsel for the Tribe to continue to sit with and advise counsel for the biological father. *Third,* the Tribe was given full opportunity to present its arguments to the Kansas Supreme Court, both by brief and by personal appearance for oral argument.

The Kansas courts provided the Tribe with full due process, greatly exceeding minimal requirements. The Kiowa Tribe was provided with a full and complete opportunity to present its position and the state courts considered these arguments prior to any rulings. Under such circumstances, the state court proceedings cannot be said to be "fundamentally flawed" and are therefore entitled to preclusive effect. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 591. (Petition for Writ of Certiorari, App. A at App. 7.)] *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Montana v. United States*, 440 U.S. 147, 164 (1979).

Furthermore, the Kansas Supreme Court properly considered the legislative history of the ICWA and the congressional findings that "an alarmingly high percentage of Indian families are broken up by the *removal*, often unwarranted, of their children *from them* by nontribal public and private agencies . . . ." 25 U.S.C. § 1901(4) (emphasis added). *See also* H.R. Rep. No. 95-1386 at 10-11, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7531 at 7532-33.

Thus, the ICWA was enacted against a background of unnecessary or unwarranted removal of Indian children living with their Indian parent(s), extended family, or Indian custodian. Congressional intent to halt unnecessary disruption of Indian children's lives and its attendant destruction of the Indian family, is reflected in the language of the Act. Sections 1902(4) (breakup of Indian families), 1911(a) (Indian child residing on reservation), 1912(d) (breakup of Indian family), 1914 (removal of child from custodian), and 1922 (Indian child residing on reservation) all "reflect the underlying thread that runs throughout the entire Act . . . that the Act is concerned

with the removal of Indian children from an existing Indian family unit and the resultant break-up of the Indian family." *In re Baby Boy L.*, 231 Kan. at 206, 643 P.2d at 175.

The Kansas Supreme Court held that neither the express language nor the purpose of the ICWA applied to the facts of this case. Seth Allan Lewis has not been removed from any Indian family or community. No Indian family was "broken up" by the adoption of Seth because no Indian family ever existed. Seth has always resided with his non-Indian family and, if the Lewises had not adopted him, Seth's biological, non-Indian mother expressly stated she would retain custody. *In re Baby Boy L.*, 231 Kan. at 206-10, 643 P.2d at 175-78.

Other state appellate courts also have held that the ICWA does not necessarily apply when a child has not been a member of an Indian family or community. *See In the Matter of G.L.O.C.*, 668 P.2d 235 (Mont. 1983); *In re Interest of S.A.M.*, 703 S.W.2d 603 (Mo. App. 1986).

III. The ICWA Does Not Create an Exception to 28 U.S.C. § 1738 or Alter the Traditional Rules of Res Judicata and Collateral Estoppel.

The Kiowa Tribe argues that the ICWA is an exception to 28 U.S.C. § 1738 and allows federal courts to relitigate matters conclusively decided by state courts. The Tribe asserts that the ICWA contemplates a federal court may set aside any state court judgment, regardless of stage of proceeding or appeal, due to an alleged insensitivity of state courts to Indian culture. (*See* Petition for Writ of Certiorari at 20-22.)

The Tenth Circuit rejected the Tribe's argument in view of this Court's decision in *Kremer v. Chemical Con-*

struction Corp., 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 592. (Petition for Writ of Certiorari, App. A at 7-8.)]

In *Kremer*, this Court held that 28 U.S.C. § 1738 embodies the concepts of *res judicata* and collateral estoppel and that federal courts consistently have applied these doctrines to matters decided by state courts. 456 U.S. at 466. The Court rejected the argument that Title VII is an exception to 28 U.S.C. § 1738 and held that exception to section 1738 will not be recognized unless a later statute expressly or impliedly creates an exception, under the established rule that two statutes will be read consistently whenever possible. 456 U.S. at 468. Noting that Title VII was enacted to assure equality in employment opportunities and federal courts were given ultimate enforcement responsibility, this Court further held that Title VII, however, did not repeal state employment discrimination laws and because the plaintiff first pursued and appealed his claim in the state courts, his Title VII action was barred. *See also Allen v. McCurry*, 449 U.S. 90 (1980).

The Tenth Circuit applied the rationale of *Kremer* to determine that the ICWA does not create an exception to section 1738 or to the doctrines of issue and claim preclusion for at least three reasons. *First*, the ICWA, like Title VII, does not expressly or impliedly create an exception to section 1738. *Second*, the ICWA does not repeal state adoption and child welfare laws and, in fact, contemplates the continued enforcement of such laws. *Third*, the ICWA does not require that a tribe asserting rights under the Act should pursue state court proceedings through the state's highest court, then abandon further appeal and attempt a collateral attack in federal court. To permit such collateral attacks would undermine the finality

of judgments—which is particularly important in child custody matters—and put state courts and litigants on an untenable "one-way street" where the finality of decisions depends solely upon who prevails. 456 U.S. at 469-70.

The United States District Court for District of Utah reached a similar conclusion in *Navajo Nation v. District Court for Utah County,* 624 F. Supp. 130 (D. Utah 1985). In *Navajo Nation,* the tribe intervened in a state adoption proceeding and moved to transfer the matter to tribal court under the ICWA. The state court denied the motion and subsequently granted the adoption. The tribe appealed to the Utah supreme court and, while that appeal was pending, filed an action in federal district court alleging violation of the ICWA and 42 U.S.C. § 1983.

The district court dismissed the action in view of the state court proceedings. The court recognized that the ICWA is intended to protect Indian culture, but that neither the ICWA nor section 1983 are exceptions to principles of issue and claim preclusion and comity.

> This Court does not sit as an appellate court for state decisions, and declaratory judgment should not be used to re-examine what has been adjudicated in another forum. . . . All parties had full and complete opportunity to be heard in the state court proceedings. It would not be in the interests of judicial economy, federal-state comity or the avoidance of piecemeal and duplicative litigation for this Court to act upon plaintiffs' claims for declaratory relief or the Section 1983 claims. [624 F. Supp. at 135.]

CONCLUSION

The Tenth Circuit properly affirmed the dismissal of the Kiowa Tribe's action as barred by the final, binding decision of the Kansas Supreme Court in *In re Adoption of Baby Boy L.* The Tribe's action is an impermissible attempt to relitigate matters conclusively determined in Kansas state court proceedings.

The Tribe's petition for writ of certiorari represents the fifth year of litigation and sixth court to hear the Tribe and its counsel's seemingly inexhaustible, meritless challenge to the adoption of now five-plus-year-old Seth Allan Lewis. The Tribe and its counsel, in its pursuit of a patently barred action, have acted without thought or heed of the trauma, fear, and heartache that Robert and Diana Lewis have suffered with each new attack on the adoption. This case gives conclusive demonstration of the very reason and need for the doctrine of *res judicata* and collateral estoppel.

Respondents Robert and Diana Lewis respectfully request that this Court bring an end to this litigation and deny the Kiowa Tribe of Oklahoma's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE CHEROKEE NATION; CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION OF THE YAKIMA RESERVATION, WASHINGTON (additional amici on inside cover) IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE
OF THE CHEROKEE NATION; ET AL.

Pursuant to Rule 36.1, amici curiae consisting of twenty-six federally recognized Indian tribes, beneficiaries of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901 et. seq., and five Indian

Organizations involved in providing assistance to tribes and their members in obtaining the full benefits of the Act, respectfully move this Court for leave to file the attached brief amici curiae in support of the petitioner Kiowa Tribe's petition for writ of certiorari in the above-captioned case. Petitioner consents to the filing of the brief; however, respondents Robert and Diana Lewis object, and therefore, this motion is necessary.

Amici have a vital interest in the resolution of the issues raised by the petitioner in this case. If the decision of the Tenth Circuit Court of Appeals is allowed to stand, Indian tribes throughout the United States which have members residing within that Circuit's jurisdiction will be denied the right to obtain collateral

review in federal courts of state court judgments denying rights granted to tribes and their members by sections 1911, 1912, and 1913 of the ICWA. Those rights include the right to intervene in a state proceeding involving tribal members, the right under certain circumstances to have a case transfered to tribal jurisdiction, and generally the right to participate fully in the decision-making process of the state court in determining the temporary and permanent placement of Indian children who are or are eligible to be members of the intervening tribe.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition for writ of certiorari are of substantial importance because they involve the construction of a key provision of a

unique remedial statute enacted pursuant to the plenary power of Congress over Indian affairs and because they involve important considerations of federalism and comity between federal and state courts.

Amici set forth in the attached brief additional reasons for granting the petition that were not presented in the petition.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE CHEROKEE NATION; ET AL.

INTEREST OF AMICI CURIAE

Amici curiae are twenty-six federally recognized Indian tribes located in nine states, and five Indian Organizations committed to the advancement of the interests of Indian tribes and their members in the implementation of the ICWA. Amici Indian tribes are beneficiaries of the

Indian Child Welfare Act of 1978 (ICWA). Amici are currently and actively involved in activities implementing the ICWA. Amici are vitally concerned that the ICWA be liberally construed by courts to achieve the protective and remedial purposes of the Act which are to prevent the break up of Indian families and to ensure the continued existance of Indian tribes and Indian culture.

The decision of the Tenth Circuit in this case severely restricts the collateral review remedy afforded by 25 U.S.C. §1914 of the ICWA. The decision thus adversely affects the interests not only of Indian tribes located within the Tenth Circuit's jurisdiction, but also of those tribes located elsewhere which have tribal members residing within that Circuit's

jurisdiction. The 1980 Census shows that 1,423,043 American Indians reside within the jurisdiction of the Tenth Circuit. This is almost one-fourth of the total American Indian population in the United States.

Amici believe that the decision of the Tenth Circuit Court of Appeals in this case defeats a critical purpose of the ICWA to authorize oversight by the federal judiciary of state court compliance with certain key provisions of the ICWA deemed by Congress to warrant the special remedy of collaterial review. Amici believe that the decision denies Indian tribes and their members a remedy critical to the effectiveness of the ICWA.

The facts of this case demonstrate the need for the section 1914 remedy. The decision of the Kansas courts in this case, adopting the narrowest

possible interpretation of the scope of the ICWA, stands as a prime example of the protectionist attitude of state courts that motivated Congress to enact 25 U.S.C. §1914.

Amici concur in the arguments presented by petitioner the Kiowa Tribe and file this brief for the purpose of setting forth additional reasons in support of the petition.

SUMMARY OF ARGUMENT

1. If state rules of preclusion apply to limit the scope of 25 U.S.C. §1914 of the Indian Child Welfare Act (ICWA), that section will be rendered superfluous. It would be reduced to authorizing collateral review only in those instances where the litigant had no opportunity to be a party in the prior adjudication. However, this remedy would be available without section 1914 under the well-recognized

common law exception to res judicata. Moreover, limiting the section 1914 remedy to litigants who were not parties to the original action is contrary to the plain language of section 1914 which on its face does not admit of any limitation on its scope. Indeed, such a restricted interpretation of section 1914 conflicts with the congressional intent underlying the ICWA and with canons of statutory construction governing the interpretation of remedial statutes especially those enacted for the benefit of Indians and pursuant to Congress' trust obligations toward Indians.

2. Under 28 U.S.C. §1738, federal courts can relitigate an issue previously adjudicated by a state court to the same extent that such issue can be relitigated in the courts

of the state from which the judgment issued. The Tenth Circuit erred in determining that Kansas rules of preclusion prevented it from relitigating the question of whether the Kansas trial court violated 25 U.S.C. §1911(c) in denying the Kiowa Tribe's motion to intervene.

First, Kansas courts, by force of the Supremacy Clause, would hold that Kansas rules of preclusion are pre-empted by 25 U.S.C. §1914 because the application of such rules would defeat the purpose of 25 U.S.C. §1914 and impair Congress' plan for enforcing compliance with the Indian Child Welfare Act (ICWA). Moreover, this holding is compelled by the overriding federal and tribal interests at stake. Those interests lie in protecting Indian children from unwarranted separation from their

tribes and Indian families by state agencies unfamiliar with Indian culture, and in promoting the stability and security of Indian tribes and families. 25 U.S.C. §1914 embodies Congress' decision that these federal and tribal interests outweigh the states' interests in the finality of state court judgments.

Additionally, the ICWA establishes that decisions of state courts violative of Indian rights under 25 U.S.C. §§1911, 1912, and 1913 are void ab initio. Thus the Act preconditions state court jurisdiction to render placement decisions upon compliance with those sections. A well-recognized exception to the applicability of the doctrine of res judicata provides that the doctrine does not bar relitigation of judgments entered without jurisdiction. The

Tenth Circuit erred in failing to determine whether that exception is adopted by Kansas law.

ARGUMENT

I. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT 25 U.S.C. §1914 DOES NOT CREATE AN EXCEPTION TO 28 U.S.C. §1738

25 U.S.C. §1914 authorizes federal courts or any "court of competent jurisdiction to invalidate" a state court action "upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901 et. seq. The Tenth Circuit Court of Appeals has held in this case that 25 U.S.C. §1914 does not authorize federal courts to disregard state rules of preclusion which such courts are obligated to apply under 28 U.S.C. §1738. This decision is erroneous.

Generally, under state rules, the

doctrine of res judicata would apply to bar relitigation of issues actually adjudicated in a prior state court action to which the litigant was a party. The doctrine would also apply to bar relitigation of issues which could have been raised by the litigant in state court, but were not. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77n.1 (1984); 18 C. Wright, A. Miller, E. Cooper; Federal Practice and Procedure §4402 (1981).

Application of the doctrine of res judicata to claims arising from sections 1911, 1912, and 1913 of the ICWA severely limits the scope of the remedy afforded by section 1914. If principles of res judicata apply notwithstanding the section 1914 remedy, any tribe, with notice of a pending state custody proceeding,

which desires to avoid a binding state court adjudication of its rights under sections 1911, 1912, and 1913 must file an action initially in federal court. Assuming the federal court does not dismiss the action for lack of a "case or controversy,"[1/] the section 1914 remedy would be rendered superfluous as to these litigants since federal adjudication would have been obtained in the first

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[1/] As to those issues where there is no indication of how a state court will rule, a federal court may find that there is no case or controversy and thus no federal jurisdiction over the case. See, e.g., Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) ("It must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") The litigant will thus be forced to submit those issues to the state court. The section 1914 remedy would as to such issues be superfluous.

instance.[2/] A tribe with notice of the pending state proceeding might, on the other hand, choose to await the state court judgment before filing suit in federal court; however, the tribe would risk a dismissal by the federal court based on principles of claim preclusion. Moreover the intent of the ICWA that tribes participate in the state proceeding would be defeated. And of course, any tribe that filed initially in state court would be bound by the state court judgment by operation of the doctrine of collateral estoppel.

[2/]Under the Tenth Circuit's interpretation, the section 1914 remedy can never be utilized to obtain collateral federal review of the issue of the tribe's right to intervene since that right must be asserted in the state courts before a state court judgment will be generated. Any such judgment will be binding on the tribe and not reviewable under section 1914.

Thus application of the res judicata doctrine to the section 1914 remedy would effectively restrict the availability of the remedy to those litigants who were not parties to the original state proceeding due to lack of notice, and hence had no opportunity to litigate the issues involved.

A well-recognized common law exception to the doctrine of res judicata provides:

> Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.

Allen v. McCurry, 449 U.S. 90, 101 (1980); accord, Haring v. Prosise, 462 U.S. 306, 313 (1983). Since this exception is grounded on due process concerns, both federal and state courts must, where the facts of the

case warrant application of the exception, deny a state court judgment preclusive effect. See, e.g., Allen v. McCurry, supra at 101; Haring v. Prosise, supra at 313-14; Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-83 (1982).

Interpreting section 1914 so that it affords no greater remedy than would be available under the above common law exception strips the remedy of all efficiency and conflicts with the canon of statutory construction that "[i]t cannot be presumed that the [Congress] would do a futile thing." C. Sands, 2 Sutherland Statutory Construction, §45.12 (4n. ed. 1973).

Moreover, its face, section 1914 does not incorporate state rules of preclusion as limitations upon its scope. In such an instance, this Court has stated that "[t]he plain

lanaguage of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act." Jefferson Cty. Pharm. Assn. v. Abbott Labs., 460 U.S. 150, 157 (1983).[3/]

Nothing in the legislative history of the ICWA indicates any congressional intention to burden the section 1914 remedy with state rules of preclusion. Indeed, the gravity of Congress' concern about the threat to

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[3/] If Congress had intended to so severely limit the scope of the section 1914 remedy by incorporating state rules of preclusion, it could have easily said so in the provision itself. Congress obviously considered carefully the scope of the remedy since it specifically limited its application to violations of sections 1911, 1912, and 1913 of the ICWA, omitting other important sections of the Act including that concerning adoptive placement. It is not reasonable to believe that with such precise craftsmanship, Congress intended to incorporate sub silentio the states' rules of res judicata.

the best interests of Indian children and to the very existance of Indian tribes compels the conclusion that section 1914 envinces Congress' decision that the policy of ensuring that state courts afford tribal litigants the rights granted by the ICWA is more important than affording preclusive effect to state court judgments, especially where state court are determining the existance and extent of their own federal obligations.

And finally, the Tenth Circuit's interpretation is contrary to applicable rules of statutory construction. Section 1914 is a remedial statute intended to resolve the growing problem of the alienation of Indian children from their tribes and Indian families by mandating that state courts and other state agencies

comply with specified standards and afford tribal litigants certain specified procedural rights. The rule of statutory construction applicable where remedial legislation is involved requires that any such statute "be construed broadly to effectuate its purposes." Jefferson Cty. Pharm. Assn. v. Abbott Labs., supra at 159.

Similarly, the rule that statutes enacted for the benefit of Indians must be liberally construed to carry out the statute's protective purposes argues forcefully in favor of an interpretation that 25 U.S.C. §1914 authorizes federal courts to disregard state rules of res judicata, and thus constitutes an implied exception to 28 U.S.C. §1738. See, e.g., Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

In effect, the Tenth Circuit's interpretation attributes to Congress an intent to give with one hand (25 U.S.C. §1914) while taking away with the other (25 U.S.C. §1738). This Court has said that where Indian rights are concerned, federal courts should not construe congressional acts "as a backhanded way of abrogating" federal rights granted to the Indians. Menominee Tribe v. United States, 391 U.S. 404, 412 (1968).

II. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT KANSAS RULES OF PRECLUSION PREVENT THE TRIBE FROM RELITIGATING THE ISSUE OF THE APPLICABILITY OF THE INDIAN CHILD WELFARE ACT

In this part of the brief, amici present two arguments relevant to the second question presented by the petition for writ of certiorari as to whether the policy underlying the ICWA outweighs the policy underlying the

doctrine of res judicata and lifts any res judicata bar. Amici submit first that 25 U.S.C. §1914 codifies Congress' decision that the ICWA policy outweighs the policy of finality of judgments, and that section 1914 therefore pre-empts state rules of preclusion. Second, amici submit that Congress intended to make compliance with sections 1911, 1912, and 1913 of the ICWA a jurisdictional prerequisite to a valid state judgment, and that, under the usual exception to the res judicata doctrine, collateral attack is permitted on a judgment void for lack of jurisdiction.

A. 25 U.S.C. §1914 Pre-Empts State Rules Of Preclusion And Prevents A State From Granting Judgments Covered By §1914 Preclusive Effect In Its Own Courts

The Tenth Circuit Court of Appeals

in this case construed Kansas law to bar relitigation of the state court judgment denying the Tribe the right to intervene under 25 U.S.C. §1911(c) because the ICWA is inapplicable under the facts of the case.[1/] See Appendix A of Petition for Writ of Certiorari at App. 4-5. However, the Tenth Circuit erred because it failed to consider the interrelationship between the Indian Child Welfare Act, and in particular 25 U.S.C. §1914, and

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[1/] This Court has ruled that when federal courts are faced with the question of whether section 1738 bars relitigation of a prior state judgment, they are required first to consider whether "state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding." Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267 (1985). And "[o]nly if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to §1738 should apply." Id. at 4268.

state preclusion rules. Amici submit that the doctrine of federal pre-emption requires a finding that state rules of preclusion are preempted by 25 U.S.C. §1914. Such a finding makes it unnecessary to determine whether 28 U.S.C. §1738 is amended by implication. A state court by force of the Supremacy Clause of the United States Constitution, Article 6, §2, would be obliged to disregard state preclusion rules pre-empted by federal statute. Likewise, under 28 U.S.C. §1738, federal courts would not be required to give full faith and credit to such pre-empted state rules.

1. **The Doctrine of Federal Pre-Emption Involves A Two-Part Inquiry**

The doctrine of federal pre-emption is frequently applied in the area of federal Indian law because

Congress exercises plenary power over Indian affairs. See, generally, F. Cohen, Handbook of Federal Indian Law, 270-79 (1982 ed.).[2/]

Under the federal pre-emption doctrine:

> Indian treaties, executive orders and statutes preempt state laws that would otherwise apply by virtue of the states' residual jurisdiction over persons and property within their borders. State laws are invalidated by the exercise of a substantive Constitutional power implemented by the Supremacy Clause of the Constitution, which declares treaties and federal statutes to be "the supreme Law of the Land. . .any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2/ This "power over Indian affairs is unusual in our federal system because it includes general federal authority to legislate over health, safety, and morals . . . . [F]ederal power is "plenary," in the sense that in Indian matters Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers." F. Cohen, Handbook of Federal Indian Law, supra at 219-20.

Id. at 270-71.

This Court most recently applied the doctrine of federal preemption to invalidate a state law found to be incompatible with the federal statutory scheme established by Pub. L. 280. See, Three Affiliated Tribes v. Wold Engineering, 55 U.S.L.W. 4654 (U.S. June 16, 1986) (hereinafter Three Tribes II). In Three Tribes II, the Court explained the nature of a federal preemption inquiry:

> [W]e have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Id. at 4656.

Applying this two-part inquiry to the question of whether state rules of preclusion are pre-empted by the

Indian Child Welfare Act, and in particular by 25 U.S.C. §1914, compels the conclusion that section 1914 pre-empts state rules of preclusion which would otherwise prevent state and federal courts from relitigating issues arising from 25 U.S.C. §§1911, 1912, and 1913.

2. The Congressional Plan Behind the ICWA Would Be Frustrated By State Rules of Preclusion

With respect to the first part of the pre-emption inquiry, the congressional plan is clear from the face of 25 U.S.C. §1914. That section permits "any court of competent jurisdiction to invalidate "an action resulting in foster care placement or termination of parental rights" upon a showing that such action violated any provision of sections 1911, 1912, and

1913."[3] This language admits of no exclusions to its terms. Thus, nothing in the plain language of section 1914 excludes from its scope instances in which an issue covered by section 1914 has been previously adjudicated by a state court. In such a situation this Court has said that "[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act." Jefferson Cty. Pharm. Assn. v. Abbott Labs., supra at 157. An examination of the legislative purpose and history reveals no such contrary intent.

As petitioner has documented in the petition for writ of certiorari at

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[3]Plainly, section 1914 contemplates that not only federal courts but also state and tribal courts would be empowered to invalidate prior actions.

10-18, the legislative history of the ICWA clearly demonstrates that a principal concern of Congress was the insensitivity to Indian culture exhibited in the past by state courts and other state agencies in the placement of Indian children in foster or adoptive homes. This concern compelled Congress to impose on state courts certain standards and procedural requirements to ensure that those courts would give due consideration to preserving "the essential tribal relations of Indian people" in determining the custody of Indian children. 25 U.S.C. §1901(5); H. R. Rep. No. 95-1386 at 19, 95th Cong. 2d. Sess. (July 24, 1978).

25 U.S.C. §1914 provides a special remedy for violation by state courts of any provision of the three sections of the Act that govern those stages of

state custody proceedings concerned with foster care placement and terminations of parental rights. 25 U.S.C. §§1911, 1912, and 1913. Under section 1914, a violation of any provision of these three sections provides a basis for invalidation of the state action. Nothing in the legislative history reveals any intention by Congress to except from invalidation state court judgments which by application of state rules of preclusion would not be subject to collateral attack.

Indeed, a construction of section 1914 which excludes from its scope any issues on the ground that they were previously adjudicated in the original action is incompatible with, and impairs the general thrust of, the congressional plan to hold state courts and other agencies strictly

accountable for correcting past deficiencies that contributed to the Indian child custody crisis.

Moreover, such an interpretation of section 1914 would effectively deny that remedy to tribes and Indian litigants who chose to participate in a state custody proceeding. Such a result only operates to discourage such litigants from participating in state proceedings. This is inconsistent with Congress' intent to encourage and increase participation by tribes and Indian litigants in state proceedings for the purpose of informing the state court about tribal culture and rebutting the culturally based testimony of non-Indian social workers. As noted in the legislative history of the Act:

> In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where non exists.
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> * * *
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> The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home.
>
> * * *
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> The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

See, H. R. Rep. No. 95-1386, supra at 10-11.

Hence, denying the section 1914 remedy to tribal litigants who choose to participate in the original state proceeding is incompatible with the purpose of the Indian Child Welfare

Act to encourage Indian participation in such proceedings.

3. Federal and Tribal Interests Outweigh State Interests

Consideration of the federal, tribal, and state interests at stake compels the conclusion that the federal and tribal interests outweigh the state interests and requires that the question of whether section 1914 pre-empts state preclusion rules be resolved in favor of tribes.

The federal and tribal interests are weighty ones: to protect the continued existence and integrity of Indian tribes which are threatened by the removal "often unwarranted" of "an alarmingly high percentage" of Indian children "by nontribal public and private agencies" and the placement of these children "in non-Indian foster and adoptive homes and institutions."

25 U.S.C. §1901(4) The legislative history of the Act is replete with statistics that clearly document the significant threat to Indian tribes by the removal of Indian children from their custody and control.

The state's interest lies in protecting the finality of judgments of its courts in child custody matters. That interest insofar as non-Indian children are concerned is not affected by 25 U.S.C. §1914. And the state's interest in the finality of state court judgments where Indian children are the subject of the custody proceeding is far outweighed by the interest of Indian tribes in protecting the continuation of their traditional ways of life by preventing the alienation of Indian children from tribal culture and people through placement in non-Indian homes and

termination of ties with the tribal culture.

The state's interest must also bow to the interest of the federal government as trustee in carrying out its longscanding responsibility to protect and preserve Indian tribes and their resources, including those children who are or are eligible to be members of tribes. By section 1914 Congress chose to strike the balance of such interests in favor of the tribal interests by authorizing the invalidation of prior state court judgments where the petitioner can show a violation of sections 1911, 1912, or 1913. Section 1914 makes no exception for actions where the claim of violation was initially asserted and adjudicated in the state proceeding.

4. Canons of Statutory Construction Support The Tribal Position

Finally, applicable rules of statutory construction argue forcefully in favor of construing section 1914 as preempting state rules of preclusion which would bar relitigation of alleged violations of sections 1911, 1912 and 1913. Any doubt or ambiguity in the interpretation of section 1914, which without question was enacted for the benefit of Indians, must be resolved in the Indians' favor. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Squire v. Capoeman, 351 U.S. 1,6-7 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Section 1914 must be liberally construed toward carrying out its

protective purposes of ensuring Indian input into state court decisions concerning custody of Indian children. Antoine v. Washington, supra, at 200; Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

In conclusion, a Kansas court would find that, by force of the Supremacy Clause of the United States Constitution, 25 U.S.C. §1914 preempts state rules of preclusion which would otherwise prevent relitigation of issues of alleged violation of provisions of 25 U.S.C. §§1911, 1912, and 1913. Hence, a Kansas state court would find that any such issues previously adjudicated in the original state action were not barred by Kansas rules of preclusion. Accordingly, 25 U.S.C. §1738 does not prevent federal courts from rehearing any such issues.

B. The Tenth Circuit Erred In Failing To Apply The Usual Exception To Res Judicata That Judgments Void For Lack Of Jurisdiction Do Not Have Preclusive Effect

The language of 25 U.S.C. §1914 coupled with the legislative history of that section demonstrate that Congress viewed compliance with 25 U.S.C. §§1911, 1912, and 1913 as a jurisdictional prerequisite to a valid state court judgment. Section 1914 by its plain terms empowers a federal court "to invalidate" a prior state action that violates "any provision of sections 1911, 1912, and 1913 . . . ." (Emphasis added.)

Congress' intent to make compliance with 25 U.S.C. §§1911, 1912, and 1913 a jurisdictional prerequisite is confirmed by the language in the original draft of the ICWA. The draft expressly

preconditioned the validity of a state court placement decision upon compliance with specified rights. The language in section 101(a) of that draft provides a typical example of the clause which proceeded specified standards and procedural safeguards: "No placement shall be valid or given any legal force and effect . . . unless . . . ."[4/] See, Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. 29-34. Section 1914 was obviously intended to provide a mechanism, i.e., collateral review, to enforce the mandate that placements violative of the Act are void and

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4/Similar clauses appear in a number of provisions of that draft preceeding statements of standards and safeguards required to be applied in the state court proceeding.

ineffective.

In this case, as part of an adoption action, the state court denied the Tribe's request to intervene which was based on 25 U.S.C. §1911(c). The court's denial was grounded on its conclusion that the ICWA was inapplicable. Thus, the question raised by that court's action is whether it violated 25 U.S.C. §1911(c). If so, by operation of the ICWA, the state court lacked jurisdiction to make the adoptive placement, and its action is void ab initio.

In Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267 (1981), this Court said:

> To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the Court lacked jurisdiction to entertain, lower courts and commentators have

> correctly concluded that a state court judgment does not bar a subsequent . . . claim. (citation omitted)

The Court further suggested that the usual view of states is that judgments entered without jurisdiction have no preclusive effect. Id. Hence, the Tenth Circuit erred in failing to determine whether Kansas law adopts this general exception to the res judicata doctrine.

CONCLUSION

This case presents important issues of statutory construction concerning the existance and extent of federal rights granted by the Indian Child Welfare Act to Indian tribes and Indian people nationally, and concerning the extent of the obligation of federal courts under that Act to grant preclusive effect to state judgments. The importance of

these questions and their national impact warrant an early and definitive ruling by this Court. Amici Curiae respectfully submit that this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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